92-39

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETT LOVE,

Petitioner,

vs.

JONATHAN KWITNY, ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Federal courts, sitting as state courts in an action brought under state law, may disregard the precedents of the highest court of the state, as well as plaintiff's affidavits, including expert affidavits, in determining whether, in opposing a motion for summary judgment in a libel action, plaintiff has met his evidentiary burden with respect to the required degree of fault.

2. Whether under the copyright law of the United States a Federal court may impose a compulsory license upon the author and copyright owner of unpublished expression in favor of an infringer whose liability was established at trial over a defense of fair use.

3. Whether knowingly misrepresenting the contents of documents and of deposition and trial testimony, as well as falsifying the trial testimony of an expert witness, in signed papers filed with the District Court constitutes a violation of Rule 11 of the Federal Rules of Civil Procedure, and whether a party may be held to have violated that rule for having made a motion asking the court to impose sanctions for such misrepresentations.

THE PARTIES

The names of the parties on the appeal in the Court of Appeals for the Second Circuit appear in the caption. In the District Court there originally were four additional defendants; the action was discontinued as against them during its pendency in the District Court. The names of these defendants, and the respective reasons for the discontinuance, are:

Congdon & Weed, Inc. (stayed on account of bankruptcy);
Coliseum Books, Inc., and Doubleday Doran Book Shops, Inc. (voluntary discontinuance);
John Kelly (insufficiency of service of process).

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Petitioner, Kennett Love, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this matter on April 3, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals, by order of the court, was not to be reported in the Federal Reporter. The opinions of the District Court have been reported: that dated January 13, 1987, at 13 Med.L.Rep. 1869 and 1987 WL 5799; that dated February 21, 1989, at 706 F.Supp. 1123 and 9 USPQ2d 2038; and that dated August 26, 1991, at 772 F.Supp. 1367.

All of these opinions are reproduced in the Appendix, as are the Court of Appeals' order denying a rehearing in banc, the District Court's order denying a motion for reargument, and the orders and judgment entered pursuant to the opinions dated January 13, 1987, and August 26, 1991.

Also reproduced is an opinion by Judge Michael B. Mukasey from a related case, *Love v. City of New York et al.*, which is reported at 1989 WL 140578 (S.D.N.Y. 1989), since that opinion is referred to in the argument.

JURISDICTION OF THE SUPREME COURT

The Court of Appeals for the Second Circuit entered judgment on April 3, 1992. Petitioner's timely Petition for Rehearing in Banc was denied on May 18, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Federal Rule of Civil Procedure 11; the relevant portions are set forth in the Appendix. (Judge Mukasey's opinion dated November 17, 1989, which is reproduced in the Appendix, contains the portions of 17 U.S.C. § 412(1) upon which it relies.)

STATEMENT OF THE CASE

A. *Factual Background*

The instant litigation was triggered by the appearance, in 1984, of defendant Kwitny's book ENDLESS ENEMIES. In ENDLESS ENEMIES Kwitny reproduced without permission over 4,500 words of an unpublished manuscript of Love's and used this material to mount a savage attack, spread over eighteen pages, upon Love's professional integrity. Love, a highly regarded journalist and historian specializing in Middle Eastern affairs, was the *New York Times* correspondent in Iran in 1953 at the time of the royalist coup that toppled the government of Prime Minister Mohammed Mossadegh. Kwitny accused Love of having covertly engineered that overthrow:

> And there we have it, folks — the Iranian correspondent for the *New York Times* . . . overthrowing the government . . .

Kwitny furthermore accused Love of having filed false stories to the *Times*, knowingly concealing the fact that U.S. Government personnel were involved in planning and financing the coup.

These accusations are, and were clearly intended to be, defamatory. They are, moreover, dangerous as well as damaging, a matter that, in the age of Salman Rushdie, hardly requires elaboration. And they are false. In more than seven years of litigation the defense has been unable to come up with a single scrap of independent evidence to support them. All of these allegations were confected from things that Love wrote or said, principally the aforementioned manuscript.

That manuscript is a term paper that Love, while on academic leave from the *Times*, wrote at Princeton University in 1960. In the term paper, Love, who had by then heard of U.S. involvement in the 1953 coup, argued the case that there had been such involvement, specifically mentioning indications to that effect that he had received in the interim, and reassessing, in light of

these, observations that he had made in Teheran in 1953. He also wove in personal experiences, of the kind that the *Times* does not permit its correspondents to inject into their stories. Two of these lie at the heart of the instant action. They occurred on the morning of August 16, 1953, and in the afternoon of August 19, 1953, respectively.

In the night of August 15-16, 1953, the Shah of Iran had attempted to dismiss Mossadegh by sending him a decree of dismissal, simultaneously sending a decree of appointment to the designated successor, General Fazlollah Zahedi. Mossadegh foiled this attempt by arresting the Shah's messenger. On the morning of the 16th, Radio Teheran reported an attempted royalist coup. Shortly thereafter Love, and the only other American correspondent in Iran, received a call from the U.S. Embassy, offering to arrange an interview with Zahedi, on condition that its mediation be kept confidential. Both correspondents accepted. Later they were driven to a villa on the outskirts of Teheran, where they met Zahedi's son. (Zahedi, apparently fearing a trap, did not appear.) The son showed them the royal *firman* (decree) appointing his father. Photocopies were made of it and both newsmen took copies back to downtown Teheran. Love — but for one that he still possesses — left his on the counter of the hotel where he and other foreign correspondents stayed. He reported the interview in the *Times*.

The other incident occurred on August 19, 1953, the day of the coup. By all responsible accounts, the coup was over by noon. International communications had been shut down by the Mossadegh authorities and Love could not get his story out. In midafternoon, when Radio Teheran, which had fallen silent after being captured by the royalist insurgents, came back on the air, he got the idea of making a broadcast. On his way to the radio station, he was narrowly missed by machine-gun fire from one of three tanks guarding Mossadegh's house. (Mossadegh himself had long fled.) Shaken, Love arrived at the radio station, where he saw six royalist tanks standing idle. He mentioned to the tank commander the carnage he had witnessed when mobs tried to storm Mossadegh's house and suggested that the tanks go "where they would be of some use" in stopping further needless slaughter.

They went, and became involved in a shoot-out with the tanks still guarding Mossadegh's house.

These incidents, which we shall refer to as the "*firman* incident" and the "tank incident", respectively, were related in Love's 1960 term paper. It is indisputable that neither of them took place during the coup itself. They do, however, form the basis – and the only basis – for defendant Kwitny's allegations that Love participated in the coup, knew, at the time, of U.S. involvement, and deliberately failed to report it to the *Times*.

In 1966 Love, who was then working on the book that was to become his classic SUEZ: THE TWICE-FOUGHT WAR, interviewed Allen W. Dulles, by then retired as Director of Central Intelligence. Dulles, recalling Love's reporting from Teheran for the *Times* in 1953, asked Love if he had written anything else about Iran. Love mentioned his term paper, and Dulles asked Love to send him a copy. Upon his return to Princeton he did so. This was Love's only contact with Dulles.

Love's term paper survived in Dulles's files until he died, in 1969, and it returned to Princeton with the personal papers that Dulles left to the University. The Dulles papers were opened to the public in 1980. They attracted both serious scholars and curiosity seekers. Several persons came across Love's paper and asked him for permission to refer to it; none of them appear to have seen anything in it that would justify inferences of the type that Kwitny drew.

While there were perfectly normal ways to obtain copies of materials in the Dulles archive, someone chose to smuggle out a copy of Love's term paper and to give it to one John Kelly, then editor of a newsletter called *CounterSpy*, which made it its business to reveal the names of U.S. undercover operatives abroad. Kelly published long excerpts from Love's term paper in *CounterSpy* and called a press conference to launch that issue. In essence, he leveled accusations against Love of the same type as those later made by Kwitny. The *Times* covered the press conference, of which Love had not been advised, and called Love for his side of the story. The resulting article appeared on

September 26, 1980. Kelly subsequently gave a copy of Love's term paper to Kwitny.

B. *Proceedings in the District Court*

The instant action was commenced by Complaint dated and filed December 27, 1984. In the Complaint, Love pleaded five causes of action, three sounding in copyright and two sounding in libel. Of the libel counts, one addressed principally those allegations in ENDLESS ENEMIES that have Love taking "an active, covert part in a CIA coup", and the other dealt with the allegations that Love "was giving his own U.S. readers an inaccurate account that ignored what he knew about U.S. responsibility" for implementing the coup. (We shall refer to these allegations as the "participation" and the "false-reporting" accusations, respectively.) Love denies that he took any part in the coup, covertly or otherwise. He says that, in August 1953, he could not have reported U.S. complicity in the coup because he did not know of it.

The defendants, in addition to Kwitny and Kelly, were the publishers and distributors of ENDLESS ENEMIES.

After a considerable amount of discovery, including an extended deposition of plaintiff, requests for voluminous production, and service of a subpoena upon the CIA, the libel defendants, by Notice of Motion dated April 15, 1986, moved for summary judgment on the libel counts, basing themselves on a number of theories. After a hearing before the Hon. Richard Owen, U.S.D.J., to whom the case had been assigned, summary judgment was granted to all of them, in an Opinion dated January 13, 1987, on the sole ground that "plaintiff has failed to meet his evidentiary burden with respect to the degree of fault as to any of these defendants".

There is no dispute between the parties that the standard of fault involved is that promulgated by New York's Court of Appeals in *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 341 N.E.2d 569, 379 N.Y.S.2d 61 (1975), to wit, that a private

individual, when defamed with regard to matters that are "arguably within the sphere of legitimate public concern", he may recover, but

> he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

379 N.Y.S.2d, at 64.

A subsequent motion for reargument was denied on May 21, 1987, and an order dismissing the libel counts, dated June 11, 1987, was filed on June 15, 1987.

On January 8, 1988, the case was reassigned, to the Hon. Michael B. Mukasey, U.S.D.J., who scheduled the trial on the copyright counts to begin on May 9, 1988. The trial was bifurcated. The first phase dealt only with the question whether there was liability for copyright infringement. It was tried to the court on May 9-11, 1988. The defenses were (a) that Love, in a telephone conversation that allegedly took place on February 21, 1983, had consented to Kwitny's use of his manuscript, and (b) fair use. Judge Mukasey rendered his decision in an Opinion and Order dated February 21, 1989, finding for plaintiff. The question of damages was addressed, without a hearing or trial, by submissions from the parties.

By Notice of Motion dated February 11, 1991, plaintiff moved for the imposition of sanctions upon defendants and their attorneys under Rule 11 of the Federal Rules of Civil Procedure, citing principally the defense's persistent misrepresentation, in papers signed and filed with the court, of the contents of documents and of deposition and trial testimony, culminating in actual tampering with such testimony in a post-trial submission.

Judge Mukasey's final Opinion and Order, dated August 26, 1991, dealt with both the damages and the sanctions issue. He

determined the monetary amounts due plaintiff from each of the defendants (in the case of Kwitny assessing costs only), denied plaintiff's motion for sanctions, and held that the filing of that motion itself constituted a violation of Rule 11. Judgment was entered on November 1, 1991. The Amended Notice of Appeal is dated November 26, 1991. Plaintiff appealed the dismissal of the libel counts, certain aspects of the damage award (especially the denial of a permanent injunction restraining defendants from further infringing the copyright in his term paper), the denial of his motion for sanctions, and the holding that he himself had violated Rule 11 by having made that motion.

During the pendency of the District Court action, a number of the defendants continued to distribute ENDLESS ENEMIES. In March of 1988 Kwitny in fact induced his employer at the time, New York City's television station WNYC-TV, to let him market the book on the air. By Complaint dated and filed October 25, 1988, Love brought another action sounding in copyright, *Love v. City of New York et al.*, also in the Southern District of New York. It bore Index No. 88 CIV. 7562 (MBM). That action was originally assigned to the Hon. Robert Sweet, U.S.D.J., and later reassigned to Judge Mukasey. By an Opinion and Order dated November 17, 1989, and filed November 20, 1989, Judge Mukasey denied a motion by plaintiff for statutory damages and attorney's fees. The aforementioned Judgment entered on November 1, 1991, also terminated proceedings in the District Court in *Love v. City of New York et al.* An Amended Notice of Appeal is dated November 26, 1991. What was appealed was the dismissal of plaintiff's claim for statutory damages and attorney's fees. For reasons to be stated below, plaintiff abandoned his appeal in *Love v. City of New York et al.* The opinion denying statutory damages and attorney's fees is, however, reproduced in the Appendix, since it is referred to in the argument below.

C. *Proceedings in the Court of Appeals*

The appeals in *Love v. Kwitny et al.* and *Love v. City of New York et al.* were docketed under Docket Nos. 91-7979 and

91-7981, respectively. Subsequently, over the objections of Love's attorney, the staff of the Court of Appeals for the Second Circuit consolidated the two appeals for all purposes, without granting Love permission to file an oversize brief. Love thereupon decided to abandon the appeal in *Love v. City of New York et al.*

The remaining appeal was duly briefed. Argument took place on March 30, 1992, and the court's decision was filed on April 3, 1992. It summarily affirmed the opinions below and put a slight gloss on the denial of injunctive relief in the copyright matter, in effect imposing a compulsory license upon Love. A Petition for Rehearing In Banc was timely filed on April 17, 1992, and denied on May 18, 1992.

Petitioner now seeks review of the Court of Appeals' decision affirming (a) the dismissal of the libel counts, (b) the denial of a permanent injunction against further infringement of plaintiff's unpublished copyrighted manuscript, and (c) the denial of sanctions under Rule 11 of the Federal Rules of Civil Procedure and the holding that, by moving for such sanctions, plaintiff himself violated the rule.

JURISDICTION BELOW

Jurisdiction in the District Court was based upon 28 U.S.C. § 1338(a), which confers upon the Federal district courts exclusive jurisdiction of any civil action arising under the Copyright Act, 17 U.S.C. Jurisdiction over the libel causes of action was pendent thereto. Jurisdiction in the Court of Appeals was based upon 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I

The Decision Below is in Conflict with Decisions of a State Court of Last Resort as Well as with Applicable Decisions of this Court

Appellate review of a grant of summary judgment is *de novo*. *Garside v. Osco Drug, Inc.*, 895 F.2d 46, at 48 (1st Cir. 1990). Judge Owen granted summary judgment to the libel defendants in the instant action on the sole ground that plaintiff had not met his evidentiary burden with respect to the required standard of fault, gross irresponsibility, as set forth by New York's Court of Appeals in *Chapadeau*, *supra*. The question on appeal, therefore, is whether plaintiff succeeded in creating a triable issue of material fact with respect to gross irresponsibility.

Judge Owen, in granting summary judgment, held that "there is no disputed issue of material fact." This appears to be based on the fact that Love stands by the recitations, in his 1960 term paper, of his acts and omissions in Teheran in 1953. (Certain theoretical speculations have in the meantime been proved wrong.) However, when we consider the question of whether Kwitny was grossly irresponsible, we clearly need to inquire into *his* acts and omissions in the period in which he was writing ENDLESS ENEMIES, and those factual issues cannot be foreclosed by the contents of Love's 1960 term paper. In short, precisely on the question of fault, it is Kwitny's actions, rather than Love's, that are at issue.

In particular, since nothing in Love's term paper even remotely constitutes an admission, on the part of Love, that he overthrew Mossadegh, or that on August 19 of 1953 he had any knowledge of U.S. involvement in the anti-Mossadegh coup, the question arises to what extent Kwitny's inferences — for that is clearly what they were — might indeed be grossly irresponsible ones. In that connection, it is worth noting that Kwitny's own trial expert on Iran testified that he did not believe that Love had overthrown Mossadegh or that he had been the central figure

in the overthrow. Clearly it is possible to draw inferences from Love's term paper that differ from those promoted by Kwitny. (Unfortunately, it is also necessary to point out that Judge Mukasey's remark, in his final opinion, that "according to his unpublished paper, [Love] was witnessing [American] involvement" in the coup is not borne out by an examination of the term paper. *Nothing* in the paper recites any direct observation by Love of American involvement in the coup.)

We have pointed out that the coup was demonstrably over, and the Mossadegh government had been overthrown, at the time of the tank incident. It follows, therefore, that the tank incident cannot have been the cause of the overthrow. Yet it is the only fact that Kwitny is able to cite to support his defamatory allegation. The opinion of Judge Owen, unfortunately, does not take note of this fact (which appeared from at least two affidavits submitted in opposition to the moving papers). Nor does it note that – if Kwitny had really studied the materials that, in his moving affidavit, he claims to have examined – he must have been aware of that fact himself. And that, of course, raises a triable issue of Constitutional malice, in the sense explained in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), in that Kwitny exhibited a reckless disregard for whether his allegations were true or false, if indeed he did not know them to be false.

Examples of Kwitny's Constitutional malice can be multiplied. In his attempt to link Love with the CIA, he terms Love's term paper – which bore the outward indicia of being precisely that, a term paper, and nothing else – as a "report . . . submitted . . . to Allen Dulles . . . while Dulles was director of all U.S. intelligence gathering." However, he knew, or should have known, from *CounterSpy* that Love sent his term paper to Dulles years after the latter's retirement. It creates a triable issue of Constitutional malice for Kwitny to have Love "getting ready to take an active, covert part in a CIA coup" at a time when, according to Love's term paper, he believed the decision to intervene had not yet been taken. Similarly, Kwitny at one point accuses Love of having given his readers "an *in*accurate account

that ignored what he knew about U. S. responsibility" when it is perfectly apparent from Love's paper that his "first observation of the association of the United States with the royalist cause" [NB: no observation of involvement in a *coup*!] came after the event on which Love had reported. The entire section of ENDLESS ENEMIES is a tissue of such reckless prevarications.

What implicates New York law, however, is that Kwitny arguably fabricated the contents of an interview with Love. Kwitny claims to have had a 15-minute telephone conversation with Love on February 21, 1983. He claims to have taken notes during that interview, but these notes contain at least six items that Love could not or would not have said at that time. For example, Kwitny claims that Love told him that Dulles circulated Love's term paper widely, and that the CIA "was very loose with it". Love has no knowledge whatever as to what Dulles did with the term paper (other than to preserve it), and the subpoena that the defense served upon the CIA for production of Love-related items did not even yield a copy of it. Moreover, Kwitny claims that Love affirmed that his failure to report on American involvement in the coup, once he learned about it later in 1953, was a result of Love's misguided patriotism, which is a natural misreading of a sentence that appeared in the *New York Times* in its article of September 26, 1980. The difficulty here is that Love had spoken to the *Times* reporter of the misguided patriotism of the *Times* itself, and he would never have assented to Kwitny's misinterpretation. Kwitny wove material from the alleged "interview" into ENDLESS ENEMIES.

Under applicable New York case law, the fabrication of this interview in and of itself raises a triable issue of Constitutional malice:

> Exactly how it may be argued that the "all-pervasive" use of imaginary incidents * * * invented dialogue * * * and attributed thoughts and feelings can be said not to constitute knowing falsity is not made clear by the defendants. . .

Spahn v. Julian Messner, Inc., 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *app. dism.*, 393 U.S. 1046, 89 S.Ct. 676, 21 L.Ed.2d 600 (1969). *Spahn*, it should be noted, did not concern the appropriateness of a grant of summary judgment; it upheld a final judgment requiring a finding of Constitutional malice.

Further New York case law relevant in this connection is *Rinaldi v. Viking Penguin, Inc.*, 52 N.Y.2d 422, 420 N.E.2d 377, 438 N.Y.S.2d 496 (1981), which considers publication of defamatory matter, once the publisher has been alerted to the fact that it is deemed offensive, to raise a triable issue of Constitutional malice. (The *New York Times* article of September 26, 1980, which Kwitny claimed to have had before him as he spoke to Love, makes it quite clear that Love considered *CounterSpy*'s allegations offensive, since Love indicated his intention to sue that publication.) Of similar tenor is a Federal-court case, *Church of Scientology of California v. Dell Publishing Co., Inc.*, 362 F.Supp. 767 (N.D. Cal. 1973), which has been cited with approval in New York. *Schermerhorn v. Rosenberg*, 47 A.D.2d 669, 364 N.Y.S.2d 210 (2d Dept. 1975).

Constitutional malice, of course, is a standard of fault much higher than gross irresponsibility, and "proof sufficient to show actual malice should be sufficient to show gross irresponsibility", *First United Fund Ltd. v. American Banks, Inc.*, 127 Misc.2d 247, 485 N.Y.S.2d 489 (S.Ct. Nassau Co. 1985). In view of the fact that this Court, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), allowed the States to "define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual", 418 U.S., at 347, a Federal court should not lightly set aside state precedents that determine whether there is evidence that the standard of liability has been met.

However, Love also produced, in opposition to the motion for summary judgment, affidavits from experts in the field of information gathering and dissemination — the domain in which the question of Kwitny's degree of fault must be examined — and these unanimously stated that the affiants considered

Kwitny's methods to have been grossly irresponsible. Such affidavits "are admissible and may defeat summary judgment if it appears the affiant is competent to give an expert opinion and the factual basis for the opinion is stated in the affidavit," *Bulthuis v. Rexall Corporation*, 789 F.2d 1315 (9th Cir. 1985). Judge Owen brushed the affidavits aside, as "opinion, and . . . not conclusive." But Love contends that, as expert opinion, they are admissible, and that they need not be conclusive – they need merely raise a triable issue of material fact.

Love submits that in fact he satisfied, by a wide margin, the condition set forth by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986), that a plaintiff must meet to survive a motion for summary judgment, to wit, that he "need only present evidence from which a jury might return a verdict in his favor." 477 U.S., at 257. *Anderson*, of course, also states that the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S., at 255. That was clearly not done in the instant action, and, accordingly, Love's right to a trial was profoundly prejudiced.

This is all the more astonishing since the Second Circuit has written that

> any journalist, commentator or analyst is entitled not to be lightly characterized as inaccurate and dishonest or libelous. We cannot disagree with the finding of the court below that it is "crucial" to such a person's career that he or she not be so treated.

Buckley v. Littell, 539 F.2d 882 (1976), *cert. den.*, 429 U.S. 1062 (1977).

Accordingly, petitioner respectfully requests that his petition for a writ of certiorari to review the decision of the Court of Appeals be granted.

II

The Decision Below is in Conflict with the Decisions of Other Circuits (and Indeed, with Earlier Decisions of the Second Circuit), as Well as with an Applicable Decision of this Court, and It Creates a Mechanism, in Copyright Law, for Which There is No Warrant in Either the Statute or in the Case Law

In his Complaint, Love had asked for a permanent injunction, restraining further infringement of his unpublished manuscript. Although he prevailed at trial in the liability phase of the copyright litigation, Judge Mukasey, pointing to the discretionary nature of injunctive relief, denied the injunction, writing:

> "Endless Enemies" does not appear now to be a hot item, and . . . it is both impossible to conceive of a future market for Love's paper that would be protected by an injunction and impermissible to hallucinate one.

Neither of these factual allegations finds any support in the record, which is, on the contrary, replete with references to the fact that Love intends to use his paper in a book on Iran. (In *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985), this Court held that an inquiry into the potential market for a copyrighted work "must take account not only of harm to the original but also of harm to the market for derivative works." 471 U.S., at 568.)

In his earlier opinion, in which he found infringement, Judge Mukasey wrote that some impairment of the market "of those interested in reading Love's account" had most likely taken place. He also endorsed the holding, in *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987), that a copyright owner "is entitled to protect his *opportunity* to sell" his work. 811 F.2d, at 99 (emphasis original). In the later opinion, Judge Mukasey furnishes no explanation why Love's market should have evaporated in the intervening two and a half years, and there appears to

be no authority whatever entitling a court to speculate on the existence or non-existence of a future market for an unpublished work.

While injunctive relief is indeed discretionary, this discretion must be "exercised in accordance with the applicable established precedents", *Indyk v. Habib Bank Limited*, 694 F.2d 54, at 57 (2d Cir. 1982). And all of the precedents – including those of the Second Circuit – are to the effect that unpublished copyrighted expression is entitled to absolute protection. In *New Era Publications International, APS v. Henry Holt*, Co., 884 F.2d 659 (2d Cir. 1989), the court went out of its way to emphasize that it was denying an injunction *only* on account of laches and would otherwise have granted it. The court wrote that

> [under ordinary circumstances] the copying of "more than minimal amounts" of unpublished expressive material calls for an injunction barring the unauthorized use . . .

884 F.2d, at 662. And in *Salinger v. Random House, Inc.*, *supra*, the Second Circuit read this Court's opinion in *Harper*, *supra*, to convey the idea that unpublished works "normally enjoy complete protection against copying any protected expression." 811 F.2d, at 96.

Harper, of course, dealt principally with the question whether *The Nation*'s use of Gerald Ford's (then) unpublished expression was fair use. Throughout the opinion in *Harper*, however, we find the Court pointing to the importance of protecting an author's right of first publication, *e.g.*:

> Publication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works.

471 U.S., at 551 (footnote omitted).

The denial of a permanent injunction in the instant action is therefore completely inconsistent with the precedents of the Second Circuit itself, as well as with its own (correct) reading of this Court's decision in *Harper*. It is also inconsistent with rulings in other Circuits. The D.C. Circuit, for example, has quoted *Nimmer on Copyright* with approval to the effect that

> it would appear to be an abuse of discretion to deny a permanent injunction where liability has been established and there is a threat of continuing infringement

(as here). *Walt Disney Company v. Powell*, 897 F.2d 565, at 568 (1990). In the instant action, liability was established at trial. The threat of continuing infringement is amply established by the fact that Kwitny, with the copyright litigation pending, continued to distribute the book, precipitating yet another copyright infringement action. This weighs heavily in favor of an injunction:

> The Court finds that the plaintiffs are entitled to a permanent injunction. . . . A prior suit . . . did not deter the defendants' course of conduct.

Flyte Tyme Tunes v. Miszkiewicz, 715 F.Supp. 919, at 921 (E.D. Wis. 1989). Note that a course of infringements may in and of itself be taken as evidence of a threat of continued infringement:

> As there is a history and *therefore* a threat of continuing violations by defendants, they are hereby enjoined, for the life of plaintiff's copyright, and any renewal thereof, from committing any further infringement . . .

United Features Syndicate, Inc. v. Spree, Inc., 600 F.Supp. 1242, at 1244-45 (E.D. Mich. 1984)(emphasis added); *app. dism.*, 779 F.2d 53 (6th Cir. 1985). Indeed, the infringing items may be ordered destroyed. *Advisers, Incorporated v. Wiesen-Hart, Inc.*, 161 F.Supp. 831, at 834 (S.D. Ohio 1958). *See also: Fisher-Price Toys, Division of Quaker Oats Company v. My-Toy Co., Inc.*, 385 F.Supp 218 (S.D.N.Y. 1974).

The Second Circuit, in affirming the trial court's denial of a permanent injunction in face of all of these precedents, wrote:

> We note that plaintiff-appellant Kennett Love will be entitled to appropriate damages/royalties for any subsequent sales of defendant-appellee Jonathan Kwitny's book, "Endless Enemies," in accordance with Judge Mukasey's opinion entered August 27, 1991.

In short, it appears to tolerate continued infringement, by Kwitny, of Love's unpublished manuscript, remanding Love to money damages. This is in effect the imposition of a compulsory license, and there is no warrant, either in the statute or in the case law, for such an act as applied to unpublished copyrighted textual matter. It is an act totally *ultra vires*, and one plainly in conflict with this Court's holding to the effect that

> Congress has not designed, and we see no warrant for judicially imposing, a "compulsory license" permitting unfettered access to the unpublished copyrighted expression of public figures.

Harper, supra, 471 U.S., at 569. The case for not judicially imposing a compulsory license on the copyrighted unpublished expression of a private party is, of course, even stronger.

We mention in passing that the monetary damages awarded Love by Judge Mukasey are 2.6% of the infringers' profits, which in the case of Kwitny comes to 2.6% of zero. (Judge Mukasey, who accepted Kwitny's income tax returns as proof of his expenses, found that Kwitny had no profits from ENDLESS ENEMIES.) Moreover, Judge Mukasey, in *Love v. City of New York et al.*, held that Love will be unable to recover statutory damages or attorney's fees for future infringements of his manuscript through distribution of ENDLESS ENEMIES, ruling that such infringement would be deemed to have commenced at the time of the original distribution of the book, in 1984, before the registration of the copyright in Love's manuscript. This makes Love ineligible, pursuant to 17 U.S.C. § 412(1), for statutory damages and attorney's fees.

III

The Decision Below is in Conflict with the Decisions of Other Circuits as Well as with an Applicable Decision of this Court, and It Sanctions a Departure, by a Lower Court, from the Accepted and Usual Course of Judicial Proceedings so as to Call for an Exercise of this Court's Power of Supervision

We turn, finally, to the trial court's disposition of plaintiff's motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure, one that was affirmed without comment by the Court of Appeals.

Rule 11, of which the relevant parts are set forth in the Appendix, imposes a three-fold obligation upon attorneys (and parties) who sign and file papers with a District Court. The attorney or party warrants that he himself has read the paper, that, *after reasonable inquiry*, he regards it as "well grounded in fact and . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose."

The appellate standard of review, in Rule 11 matters, is a bifurcated one. Findings of fact are reviewed under the "clearly erroneous" standard, while the question whether a given set of facts constitutes a violation of the rule is examined *de novo*. *See, e.g., Stitt v. Williams*, 919 F.2d 516, at 521 (9th Cir. 1990); *Robinson v. National Cash Register Company*, 808 F.2d 1119, at 1126 (5th Cir. 1987). It is certainly the law of the Second Circuit. *Eastway Construction Corporation v. City of New York*, 761 F.2d 243 (2d Cir. 1985), *cert. den.*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

Accordingly, plaintiff on appeal focused on misrepresentations and other false statements made by the defense throughout the litigation in which both the original documents (or deposition or trial testimony) and the misrepresented version were in the record, so that there could be no dispute as to the underlying facts. All the same, the Second Circuit did not deem these

misrepresentations, of which we shall now give a fair sampling, to violate Rule 11.

1. In the *New York Times* of September 26, 1980, in the article about the *CounterSpy* news conference, there appeared the following sentence about Love:

> He said his failure to report on American involvement in the coup, once he learned about it later in 1953, was a result of "misguided patriotism."

It cannot be denied that the clause between the commas constitutes a clear disclaimer, on the part of Love, to the effect that, on August 19, 1953, the day of the coup, he did not know of American involvement. The defense, in the Statement of Uncontested Facts that, under local rule 3(g) of the Southern District of New York, must accompany a motion for summary judgment, represented to the trial court, in a paragraph dealing with that article from the *Times*, that

> Love is quoted in the article as stating that *his involvement in the Iranian coup* was a result of "misguided patriotism."

(Emphasis added.) This turns what was a denial, on the part of Love, of the false-reporting allegation into a confession to the participation allegation, and represents that as an uncontested fact! If this is not a violation of Rule 11, and in particular of the requirement that statements be "well grounded in fact", it is difficult to imagine what would be. Surely whatever inquiry defense counsel can have made in this connection will not meet the "standard ... of reasonableness under the circumstances" that now governs such matters, at least in other Circuits. *Lloyd v. Schlag*, 884 F.2d 409, at 412, *amended*, (9th Cir. 1989).

Judge Mukasey refused to consider this gross misrepresentation a violation of Rule 11, on the grounds that (a) the defense later made a (grudging) retraction, and (b) it was not outcome-determinative. However, these are not the standards by which

such matters are judged, at least in other Circuits. "The violation of Rule 11 is complete when the paper is filed." *Szabo Food Service, Inc. v. Canteen Corporation*, 823 F.2d 1073, at 1077, *reh. and reh. en banc den.* (7th Cir. 1987), *cert. dism.*, 485 U.S. 901, 108 S.Ct. 1101, 99 L.Ed.2d 229 (1988), quoted with approval in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, at 2455, 110 L.Ed.2d 359 (1990). And retraction does not exonerate:

> That counsel may only have made a mistake, * * *, readily acknowledged and rectified his or her error, * * *, committed only a "clerical error," * * *, or at all times acted in good faith, * * *, will not release him from sanctions.

Alvarado Morales v. Digital Equipment Corporation, 669 F.Supp. 1173 (D. Puerto Rico 1987), *aff'd.*, 843 F.2d 613 (1st Cir. 1988).

2. Likewise in the Statement of Uncontested Facts, the defense represented to the trial court that in his term paper

> Love states that he personally suggested to Iranian tank commanders loyal to the Shah that they attack Mossadegh's house and that in response the tank commanders did, in fact, attack Mossadegh's home.

However, one will search in vain through Love's term paper to find any reference to his having urged an attack on Mossadegh's house. This misrepresentation clearly violates the standards of at least the Seventh Circuit, which has stated flatly that "this court will not tolerate the making of unsubstantiated factual allegations by attorneys in papers filed with the court." *In re Kelly*, 808 F.2d 549, at 552 (7th Cir. 1986).

3. At Love's deposition, the defense questioned him at some length about a paragraph in an article that Alexander Cockburn published in *The Nation*, issue of May 26, 1984, shortly after the appearance of ENDLESS ENEMIES. In the moving papers on the motion for summary judgment, the defense represented to the court that

> although Love had numerous quibbles with the article's accuracy, he testified that he did not object to the accuracy of this paragraph (Love Dep., p. 538-52).
>
> Thus, Love has conceded that Cockburn's statement is accurate . . .

This (third) defense-confected confession founders on the fact that Love, far from conceding the accuracy of the paragraph in question, actually objected to it on seven of those pages of his deposition.

4. We discussed above the notes that Kwitny allegedly took during a telephone conversation with Love on February 21, 1983, and we pointed out that, for a number of reasons, they are arguably a fabrication. In a post-trial submission, the defense, in an attempt to establish the genuineness of these notes, alleged that

> Love testified that the [post office] box number listed on Kwitny's notes was indeed his, and that the box number was not publicly available.

A few pages later, this is made the basis for the argument that

> *Love's own testimony* establishes that his P.O. Box address was not publicly available and could have been obtained by Kwitny *only from Love.*

(Emphasis original.) The plain fact, however, is that Love did not testify that the post office box number was not publicly available. He testified that he would not then have given it out, since he was living, and receiving his mail, elsewhere. Thus Kwitny could not have obtained the number from Love. Love specifically said that it appeared on his older stationery. It also appears in the Princeton Alumni Directory (1982 edition) and in *Who's Who in the East* (1983-1984 edition), which is to say that it was indeed publicly available.

Judge Mukasey wrote that "one example will suffice" for his discussion of plaintiff's claims of Rule 11 violations in the

copyright part of the litigation, and he did not choose this particular one. Had he done so, he could not have argued once more that it was not outcome-determinative. For, in his first opinion he found that a telephone conversation had indeed taken place between Kwitny and Love on February 21, 1983. In doing so, he specifically stated that the force of the evidence of a telephone *connection* (which Love never questioned; indeed, it was his attorney who secured Kwitny's toll-call record) "is enhanced by the presence of Love's post office box number in Kwitny's notes, information that could not have come from any source demonstrably available to Kwitny other than Love himself."

5. In the Joint Pre-Trial Order filed in the District Court on May 6, 1988, the defense represented that both of its proposed expert witnesses would testify about Love's role as an "insider" in the 1953 anti-Mossadegh coup. Much to their credit, they did not do so. Since the defense would presumably have wanted to elicit such testimony, if at all possible, but in fact did not, one may infer that its representation in the Pre-Trial Order was itself fraudulent, unsupported by the "reasonable inquiry" required by Rule 11, and therefore in violation of it.

The defense thereupon fabricated the testimony by tampering with the actual testimony of one of its experts. Professor Marvin Zonis, of the University of Chicago, stressing the liveliness of Love's writing about the coup, said that "this is not some author's accounts of an event but ... a contemporaneous eyewitness account". Love has no problems with that. He was indeed not just "some author", but an eyewitness (to the coup, that is — not to American involvement!).

In the defense's post-trial submission, this passage was altered. It was represented that Professor Zonis testified that Love's term paper "is not some *outsider's* account" (emphasis added). And, of course, if it is not an outsider's account, it must be an insider's. Thus the testimony fraudulently advertised but not actually elicited at trial is even more fraudulently concocted in a post-trial submission.

In raising these, and scores of other, similar incidents, Judge Mukasey held, Love merely objects to "advocacy by his opponent.

Yet advocacy, even accompanied by occasional mistakes, is precisely what courts must be careful to protect even as they apply Rule 11." He cites *Eastway, supra*, as the authority for this proposition. In *Eastway*, while actually imposing sanctions, the Second Circuit stated that it did "not intend to stifle the enthusiam or chill the creativity that is the very lifeblood of the law", 762 F.2d, at 254. As we have seen, outright knowing misrepresentations of fact are not tolerated in other Circuits, and even innocent, "accidental" errors may be sanctioned by them. The Second Circuit's summary affirmance suggests that it applies a different standard.

Judge Mukasey further states "that plaintiff has condemned as a Rule 11 violation any suggested view or interpretation of the facts that differs from his own." What Love actually condemned, however, is the defense's palming off this "view or interpretation" as if it were the actual fact. And if that is permitted in the Second Circuit, it is not permitted in the Seventh:

> A statement of positive fact is a representation not only that the fact is true as represented, but also that the person making the statement has a solid basis for making it.

In re Kelly, supra, 808 F.2d 549, at 551. In any event, zealous representation, and enthusiasm and innovation in advocacy, are constrained by higher obligations. *Robinson v. National Cash Register Company, supra*, 808 F.2d, at 1131. Accord:

> Too often a lawyer loses sight of his primary responsibility as an officer of the court. While he must provide "zealous advocacy" for his client's cause, we encourage this only as a means of achieving the court's ultimate goal, which is finding the truth. Deceptions, misrepresentations, or falsities can only frustrate that goal and will not be tolerated within our judicial system.

Polansky v. CNA Insurance Company, 853 F.2d 626, at 632 (1st Cir. 1988). Litigants in the Second Circuit should be held to no less august a standard.

In any event, whether the defense violated Rule 11 or not, it appears to have been an abuse of discretion for the trial court to have held that plaintiff violated it, by making his Rule 11 motion. This is so, if for no other reason, because plaintiff's moving and reply memoranda documented in considerable detail that acts and omissions such as those complained of, as the defense's violations of the rule, have triggered sanctions in other Circuits. "A serious Rule 11 motion is not a gnat to be brushed off with the back of the hand. This motion was serious; it should have received serious attention". *Szabo, supra*, 823 F.2d, at 1084.

CONCLUSION

For the reasons contained herein, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit in the captioned matter.

Respectfully submitted,

MICHAEL KENNEDY
Counsel of Record
Attorney for Petitioner
425 Park Avenue
New York, New York 10022
(212) 935-4500

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of May one thousand nine hundred and ninety two.

KENNETT LOVE,

Plaintiff-Appellant,

v

DOCKET NUMBER: 91-7979

JONATHON KWITNY, CONGDON & WEED INC., ST. MARTIN'S PRESS, BOOK OF THE MONTH CLUB INC., BARNES & NOBLE BOOKSTORES INC., B. DALTON COMPANY

Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/Elaine B. Goldsmith
ELAINE B. GOLDSMITH,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 3rd day of April, one thousand nine hundred and ninety-two.

United States Court of Appeals
Second Circuit
Filed April 3, 1992

PRESENT: HONORABLE LAWRENCE W. PIERCE,
HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

HONORABLE CHARLES M. METZNER,*

District Judge.

KENNETT LOVE,

Plaintiff-Appellant,

— against —

No. 91-7979

JONATHAN KWITNY, ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

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* The Honorable Charles M. Metzner, United States District Judge for the Southern District of New York, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said district court be and it hereby is AFFIRMED.

1. We affirm substantially for the reasons stated in the thorough opinions of the United States District Court for the Southern District of New York by Richard T. Owen, *Judge*, entered July 15, 1987, and Michael B. Mukasey, *Judge*, entered February 21, 1989 and August 27, 1991.

2. We note that plaintiff-appellant Kennett Love will be entitled to appropriate damages/royalties from any subsequent sales of defendant-appellee Jonathan Kwitny's book, "Endless Enemies," in accordance with Judge Mukasey's opinion entered August 27, 1991.

/s/Lawrence W. Pierce
Hon. Lawrence W. Pierce, U.S.C.J.

/s/J. Daniel Mahoney
Hon. J. Daniel Mahoney, U.S.C.J.

/s/Charles M. Metzner
Hon. Charles M. Metzner, U.S.D.J.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

ORDER AND JUDGMENT
Filed November 1, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

KENNETT LOVE,

Plaintiff,

-against-

84 CIV. 9289 (MBM)

JONATHAN KWITNY, CONGDON & WEED, INC., ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY, COLISEUM BOOKS, DOUBLEDAY DORAN BOOK SHOPS, INC., and JOHN KELLY,

Defendants.

----------x

KENNETT LOVE,

Plaintiff,

-against-

88 CIV. 7562 (MBM)

CITY OF NEW YORK, Edward I. Koch, Mayor; DEPARTMENT OF GENERAL SERVICES (of the City of New York), Hadley W. Gold, Commissioner; WNYC COMMUNICATIONS GROUP, Mary Perot Nichols, President, Madison D. Lacy, Vice President and General Manager, Television; and JONATHAN KWITNY,

Defendants.

----------x

The Fourth and Fifth Causes of Action in the Complaint in *Love v. Kwitny et al.*, 84 CIV. 9289 (MBM), having been dismissed by an Order of the Hon. Richard Owen, U.S.D.J.,

dated June 11, 1987, and filed on June 15, 1987; said action having been stayed or discontinued against defendants Congdon & Weed, Inc., Coliseum Books, Doubleday Doran Book Shops, Inc., and John Kelly, the discontinuance against defendant Kelly having made moot the Third Cause of Action in the aforementioned Complaint; defendants Barnes & Noble Bookstores, Inc., and B. Dalton Company having been merged, during the pendency of the action, into BDB Corporation; a trial without jury having been held on May 9-11, 1988, on the question of liability on the First and Second Causes of Action in the aforementioned Complaint and the Causes of Action in the Complaint in *Love v. City of New York et al.*, 88 CIV. 7562 (MBM), and the Court having found for plaintiff, in an Opinion and Order dated and filed on February 21, 1989; plaintiff having waived his damages against all defendants other than defendant Kwitny in *Love v. City of New York et al.*, 88 CIV. 7562 (MBM); and the parties having submitted exhibits and memoranda of law on the question of the remaining damages,

Now, upon considering the pleadings, affidavits, exhibits, and memoranda of law submitted by the parties, and due deliberation having been had, and the decision of the Court having been made in a written Opinion and Order dated August 26, 1991, and filed on August 27, 1991, it is hereby

ORDERED AND ADJUDGED, that plaintiff shall recover his costs in both actions from defendant Kwitny, and from the remaining defendants in *Love v. Kwitny et al.*, 84 CIV. 9289 (MBM), the amounts stated below:

St. Martin's Press, Inc.	$607.72
Book-of-the-Month Club, Inc.	422.18
BDB Corporation	152.39

/s/

U.S.D.J.

SO ORDERED:

Kennett LOVE, Plaintiff,

v.

Jonathan KWITNY; Congdon & Weed, Inc.; St. Martin's Press, Inc.; Book-Of-The-Month Club, Inc.; Barnes & Noble Bookstores, Inc.; B. Dalton Company, Coliseum Books; Doubleday Doran Book Shops, Inc.; and John Kelly, Defendants.

Kennett LOVE, Plaintiff,

v.

CITY OF NEW YORK, Edward I. Koch, Mayor; Department of General Services (of the City of New York), Hadley W. Gold, Commissioner; WNYC Communications Group, Mary Perot Nichols, President, Madison D. Lacy, Vice President and General Manager, Television; and Jonathan Kwitny, Defendants.

Nos. 84 Civ. 9289 (MBM),
88 Civ. 7562 (MBM).

United States District Court,
S.D. New York.

Aug. 26, 1991.

Stefan Bauer-Mengelberg, New York City, for Plaintiff.

John C. Lankenau and Robert D. Balin, Lankenau & Bickford, New York City, for defendants.

OPINION AND ORDER

MUKASEY, District Judge.

The parties are before this court for what should be the last time in order to resolve two matters: (i) the relief to which plaintiff is entitled as a result of defendants' copyright infringement, and (ii) whether the record before Judge Owen, and later before me, justifies the conclusion that defendants and their counsel violated Fed. R. Civ. P. 11. This case has been the subject of three prior opinions in this court, one by Judge Owen dismissing the libel claim, *Love v. Kwitny*, 1987 WL 5799 (S.D.N.Y. 1987), and two by me — the first determining the copyright infringement claim, *Love v. Kwitny*, 706 F. Supp. 1123 (S.D.N.Y. 1989), and the second dismissing plaintiff's claim for statutory damages and attorney's fees. *Love v. Kwitny*, 1989 WL 140578 (S.D.N.Y. 1989). Familiarity with those prior opinions is assumed for current purposes.

For the reasons set forth below, plaintiff will recover of the following defendants either the amounts specified, which are the fair proportion of each of their profits from the sale of "Endless Enemies" that may be attributed to the infringement, or, as to Kwitny, costs, which shall include the cost of serving him with the summons and complaint when he failed to acknowledge service by mail:

Book of the Month Club — $422.18
St. Martin's Press — $607.72
BDB Corporation — $152.39
Jonathan Kwitny — costs to be taxed

No injunction will be entered restraining further sale of the book or requiring destruction of remaining copies or plates. Plaintiff's motion for Rule 11 sanctions is as meritless as it is tendentious — which is to say, utterly — and is denied in all respects.

Plaintiff is found to have violated Rule 11 by filing a meritless Rule 11 motion, but will suffer no sanction beyond the sting of that finding.

I.

The parties have stipulated that Love has waived any claim for his own lost profits pursuant to 17 U.S.C. § 504(b). In view of the earlier dismissal of his claim for statutory damages pursuant to 17 U.S.C. §§ 504(c) and 505, that leaves only a claim for profits of defendants attributable to their infringement of the copyrighted work. 17 U.S.C. § 504(b). The parties differ over the percentage of profits from "Endless Enemies" attributable to the infringement.

The parties have stipulated also the gross revenues of each of the defendants, and certain expenses which plaintiff concedes may be deducted from gross revenues to determine profits; they have stipulated as well the amounts of the expenses in the categories of deductibility they dispute. Those disputed categories are overhead expenses, royalty payments and income taxes. The parties disagree also as to whether an award of prejudgment interest or costs is appropriate in this case.

A. Percentage of Profits Attributable to Infringement

The parties have stipulated that the infringed portion of plaintiff's manuscript accounted for 11 pages of Kwitny's 421-page book.

Plaintiff does not so much argue an appropriate percentage of profit to be attributed to the infringement here as throw out hints based on what courts have done in other cases and suggest that any substantial percentage up to 100% of defendants' profits would be appropriate. Thus, he cites a dictum in a footnote in *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 508 F. Supp. 798, 801 n.10 (S.D.N.Y. 1981), *modified*, 722 F.2d 988 (2d Cir. 1983), to the effect that no apportionment is necessary in cases involving willful plagiarism. He points out that plaintiff

in *Smith v. Little, Brown & Co.*, 273 F. Supp. 870, 874 (S.D.N.Y. 1967), *aff'd*, 396 F.2d 150 (2d Cir. 1968), was awarded all of defendant's profits even though the material plagiarized in that case was "comparatively small" in relation to the size of the full work. He notes that plaintiff in *Blackman v. Hustler Magazine, Inc.*, 620 F. Supp. 792 (D.D.C. 1985), *aff'd in part and rev'd in part*, 800 F.2d 1160 (D.C. Cir. 1986) was awarded 60% of defendant's profits for one infringement when the infringing material constituted at most 4.4% of the publication, and was awarded 35% of the profits for a second infringement when the material in question constituted 4.7% of the publication.

We may be dealing here with guile by Kwitny, as the opinion on the liability phase of the case pointed out, 706 F. Supp. at 1133, but we are not dealing with willful plagiarism — the passing off of someone else's work as one's own. Nor is this case analogous to *Smith*, where the plagiarized material was the outline for a novel then expanded and sold by defendant, such that the small amount taken infected the entire resulting work.

Nor can this case be analogized to *Blackman*, where the infringed material — copyrighted nude photographs of plaitiff's former model Elizabeth Ray, who was "catapulted . . . into the public eye" by the disclosure of her relationship with a United States Congressman, 620 F. Supp. at 794 — was used as a "lure to attract readers." *Id.* at 801. Despite plaintiff's extravagant claims that his work was a "central feature" of "Endless Enemies" (Plaintiff's Brief on Damages, p.10), there was but one oblique reference to plaintiff in the numerous reviews submitted as exhibits to the stipulation between the parties (Stipulation, Exh. L), and his manuscript and its treatment were not used at all in promotional material about the book. (Stipulation Exhs. F-K) That is not surprising. The treatment Love's manuscript received in Kwitny's book, as opposed to the non-copyrightable facts it contained, was beside the point of the book; "Endless Enemies," after all, was about what the author felt were the follies of this country's foreign policy, not the alleged foibles of its journalists. By no stretch of even the most salaciously elastic imagination do excerpts from Love's manuscript stand in relation to Kwitny's

book as Blackman's photographs of Ms. Ray stand in relation to Hustler Magazine.

Defendants argue that because the infringing material amounted at most to about 2.6% of the book, plaintiff should be limited to 2.6% of the profit. The book dealt with U.S. foreign policy throughout the world; by no means did it focus solely or even substantially on events in Iran in 1953. Certainly, the infringed material cannot be said to amount to more than 2.6% of the book, and I believe that figure is generous to plaintiff because it necessarily includes the impact that results from use of non-copyrightable facts.

B. Deductible Expenses

Defendants urge that overhead expenses be calculated by allocating to proceeds from sales of "Endless Enemies" both direct and indirect overhead expenses in the same proportion that those expenses bear to each defendant's net sales for the relevant year. That is known as the "full absorption" approach, and the authority in this jurisdiction supports its use, as reflected in Judge Knapp's comprehensive opinion in *Warner Brothers, Inc. v. Gay Toys, Inc.*, 598 F. Supp. 424, 428-29 (S.D.N.Y. 1984), and cases cited therein.

Plaintiff urges that no infringing defendant should be allowed to deduct income taxes for purposes of computing profits. His position finds strong support in *Schnadig Corp. v. Gaines Mfg. Co.*, 620 F.2d 1166, 1169-71 (6th Cir. 1980), where the Court in a patent case analyzed what happens when an infringer is allowed to subtract taxes before calculating profits payable to the plaintiff and concluded, correctly, that the result is a profit to the infringer. That analysis was as follows:

> "When an infringer is required to pay damages to a design patentee, the amount so paid is deductible from his income tax. To illustrate, if a company earned a net pre-tax profit of $100 by infringing, paid $50 in tax, and paid the remaining $50 as damages to the

> patentee, the infringer would have no remaining cash, but would have a $50 tax deduction available to him. At our fictional 50% tax rate, this deduction would be worth $25 to the infringer, and if the deduction is fully utilized it would represent a $25 net overall gain on the infringement. The reciprocal of the infringer's deduction of the award is the patentee's inclusion of the award in his gross income. Retaining our fictional 50% tax rate, the patentee will keep only $25 of the $50 award, paying the other $25 in tax. In that hypothetical, but very realistic, possibility, the infringer nets as much as his victim, and perhaps even more if the dynamics of the money market are considered."

620 F.2d at 1169.

The corporate defendants, in a footnote, distinguish that case as having arisen under the patent laws, but offer no explanation why the Sixth Circuit's logic does not apply as forcefully to copyrights as to patents. Rather, they argue that relevant authority in this Circuit would disallow the deduction of income taxes only in cases involving willful behavior, and that because this case discloses no such conduct by those defendants, they should be permitted to deduct taxes in computing profits. *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 106 (2d Cir. 1951); *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 53 (2d Cir. 1939) (L. Hand, J.), *aff'd*, 309 U.S. 390, 60 S.Ct. 681, 84 L.Ed. 825 (1940); *Gay Toys*, *supra*, 598 F. Supp. at 431.

However, those cases did not deal directly with whether a non-willful infringer should be permitted to deduct from profits amounts paid as income taxes, but only with whether a willful infringer should be allowed to do so. In *Sheldon*, the first case in this Circuit to suggest that principle, the Court of Appeals reversed a master's decision to allow an infringer to deduct income taxes. The master had concluded that defendants were

not deliberate plagiarists; the Court of Appeals concluded otherwise, and disallowed the deduction of income taxes, commenting as follows:

> "It does indeed seem somewhat arbitrary to distinguish this from other expenses necessary to the business; yet on the other hand the distinction illustrates that in dealing with a conscious wrong-doer, courts do not feel obliged for consistency's sake to take one extreme or the other."

Sheldon, 106 F.2d at 53.

The fallacy in that passage lies in its reference to taxes as "other expenses necessary to the business." Only in a vernacular sense are taxes "expenses." Federal income taxes are calculated by multiplying the tax rate by "taxable income" – which itself is the difference between gross income and deductible expenses. 26 U.S.C. §§ 1, 63. In other words, income taxes are a *function* of income rather than an element of the expenses that one subtracts from gross revenues in order to calculate income. The tax code, which permits the full amount paid as damages (although not fines and penalties) to be deducted, *see* 26 U.S.C. § 162; *Schnadig*, 620 F.2d at 1169, n. 7, should not be disregarded when a court considers the treatment under the Copyright Act of amounts paid as income tax. As the analysis in *Schnadig* demonstrates, the deductibility of damages under the tax code enables the infringer to pay only his full gain from the infringement and avoid any out-of-pocket loss even if he cannot deduct income taxes before calculating "profits of the infringer attributable to the infringement" under § 504(b) of the Copyright Act. However, permitting the infringer to deduct income taxes before calculating "profits" effectively allows the infringer to retain as profits an amount equal to the product of his marginal tax rate times that profit because he pays the copyright owner his total after-tax profits *during the period of infringement* only, but then gets a full deduction for that payment in the later tax year when the payment is made, without having to share the fruits of that deduction with his victim.

The suggestion in *Sheldon* and *Catalda* that income taxes may be deducted by a non-willful infringer was not necessary to the decision in those cases, both of which dealt with willful infringers. That suggestion, therefore, is dictum. Moreover, it does not appear to be the sort of considered dictum that was intended to announce a rule or serve as a guide to district courts in the future. *Cf.*, *United States v. Oshatz*, 912 F.2d 534, 540 (2d Cir. 1990). Therefore, notwithstanding the eminence of the author of *Sheldon*, there should be no distinction between willfull and non-willful infringers as to deductibility of income taxes. Neither should be allowed to deduct them in calculating profits under the Copyright Act. Accordingly the damages calculation does not allow for deduction of the corporate defendants' income taxes as set forth in the stipulation between the parties. (Stipulation, ¶¶ 10, 21, 33) There is no issue of income taxes as to Kwitny because he made no money on the book.

To the extent plaintiff's argument focuses on items claimed by particular defendants, those are treated below.

1. Book of the Month Club

Plaintiff disputes this defendant's deduction of royalty payments to Congdon & Weed, citing Judge Frankel's decision in *Kingsrow Enterprises, Inc. v. Metromedia, Inc.*, 203 U.S.P.Q. 598 (S.D.N.Y. 1978), where he held that defendant "should not as a matter of law or fairness be allowed to fob that effort off on the plaintiff." *Id.* at 600. Defendant's response is rather less helpful than it might have been, apparently because defendant confined its search for that quotation to the Westlaw segment attached as Exhibit B to its reply brief, which includes only a summary order. Had defense counsel consulted the book plaintiff cites, published by the Bureau of National Affairs, rather than relying on the electronic data base compiled by that publisher's competitor, they would have found the quotation set forth above and perhaps been in a position to point out that the licensor recipient of the royalty there at issue was not a party to the litigation, unlike Congdon & Weed here, and thus that plaintiff would have had to file an additional lawsuit to collect

the sum. In any event, there was nothing improper about payment of the royalty, which was a legitimate expense, and authority supports a deduction. *Smith v. Little, Brown & Co.*, 396 F.2d 150, 151-52 (2d Cir. 1968), and cases cited therein.

2. Kwitny

Kwitny has asserted that it cost him more to write "Endless Enemies" than he made on it, and has attached as proof the Schedules C to his tax returns for the relevant years and records of advances and royalty payments to him. From the stipulation entered into among the parties, and those schedules and exhibits, it appears that Kwitny received an income of $33,335 as a result of "Endless Enemies" (Stipulation, ¶¶ 38-40), and had expenses of $49,038 fairly attributable to writing and distributing the book, including a $5000 loan to Congdon & Weed to help continue production of the book, which loan was not repaid due to the publisher's bankruptcy, and his purchase of 78 copies of the book for $953.37. (Stipulation, ¶ 41 (a)-(c), Exhs. D, E, N, Q) Because Kwitny apparently gave away all or most of those copies, that expenditure cannot be said to have been related to generating income, and should be disallowed. However, that disallowance still does not put Kwitny in the black as to "Endless Enemies."

Love's principal argument against allowing these deductions is that Kwitny's tax returns are not proof, in part because they never passed through the crucible of an audit. The returns were prepared and submitted to the Internal Revenue Service under penalty of perjury before Kwitny had any reason to shade them in response to this lawsuit. They are unremarkable, at least to my untrained eye, and plaintiff has not suggested that any claimed expenditure should be regarded as suspicious. Neither has plaintiff suggested any fact or document disclosed during discovery that would blemish the facial sufficiency of the tax returns. We are not dealing here with the kind of failure to keep records that confronted the courts in *Dolori Fabrics, Inc. v. The Limited, Inc.*, 662 F. Supp. 1347, 1357 (S.D.N.Y. 1987) (Lumbard, C.J.), *Blackman v. Hustler Magazine, Inc.*, *supra*, 620 F.

Supp. at 799 and *Williams v. Arndt*, 626 F. Supp. 571, 572 (D.Mass. 1985), where defendants either failed to submit proof or concocted records for purposes of the lawsuit. The tax returns are proof, and in this case I find them sufficient to establish the deductions claimed.

C. Prejudgment Interest

There is a substantial debate about whether prejudgment interest is available under any circumstances in copyright cases, Congress having failed to provide for the award of such interest under the Copyright Act although it did provide for such a remedy under the Patent Law, which protects a similar interest. *Compare* 35 U.S.C. § 284 *with* 17 U.S.C. § 505. This remains a debatable proposition even though our own Circuit has affirmed a copyright award that included prejudgment interest, but did so without addressing the issue. *Lottie Joplin Thomas Trust v. Crown Publishers*, 592 F.2d 651, 656 (2d Cir. 1978) Moreover, even if such interest were found available under the 1909 statute, as in *Lottie Joplin Thomas*, there would remain doubt whether it is also available under the 1976 Copyright Act, and whether the rationale for Congressional silence advanced in *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 886 F.2d 1545, 1550-53 (9th Cir. 1989), *cert. denied*, ____U.S.____, 110 S.Ct. 1321, 108 L.Ed. 2d 496 (1990) as to the 1909 statute applies with equal force to the 1976 statute. *See, e.g., Robert R. Jones Assocs., Inc. v. Nino Homes*, 858 F.2d 274, 282 (6th Cir. 1988); *Broadcast Music Inc. v. Golden Horse Inn Corp.*, 709 F. Supp. 580 (E.D.Pa. 1989) (no prejudgment interest available under 1976 Copyright Act, Congress having failed so to provide).

However, that is a thicket I need not enter because plaintiff has conceded in his brief that "ordinarily pre-judgment interest is not awarded in copyright cases . . ." but notes that "there are times when special circumstances justify an exception to the rule . . . ." (Plaintiff's Brief on Damages, p.13 (citations omitted)) The only exceptional circumstance plaintiff has advanced is implicit in an excerpt he quotes from *Cutter* v. *Gudebrod Bros. Co.*, 190 N.Y. 252, 255, 83 N.E. 16 (1907), suggesting that when

the amount of damages is clear at the time of infringement, a defendant can avoid the accretion of interest by paying the amount clearly due, and therefore it is reasonable to award interest when the infringer fails to pay such damages immediately. This is not such a case. It would have been impossible for any of the corporate defendants, or even for Kwitny, against whom no damages have been assessed because he made no money on the infringement, to have estimated at the time how much in damages would be attributed to the infringement, even assuming without deciding that they should have anticipated the outcome of the liability trial. There are no special circumstances here to justify the award of prejudgment interest against those defendants found liable for money damages, either of the sort suggested by plaintiff or of any other sort.

D. Costs

Defendants' position on the subject of costs is tucked discreetly into a footnote, which reads in its entirety as follows:

> So too, plaintiff has asserted no grounds for the discretionary award of costs under 17 U.S.C. § 505 or for the award of the costs of personal service under Fed. R. Civ. P. 4(c)(2)(D).

(Defendants' Answering Memorandum of Law on Copyright Damages, p.10 n.*) That is not entirely true. Plaintiff asserts in his brief that Kwitny did not bother to return the acknowledgment of service that accompanied the summons and complaint. (Plaintiff's Brief on Damages, p.14) That is enough to require an award of the cost of personal service. Fed. R. Civ. P. 4(c)(2)(D). Moreover, although plaintiff has not specified the grounds on which he requests costs, they are apparent from the opinion on the liability phase of the case. Kwitny was the only active infringer, and he accomplished the infringement with substantial reliance on guile to make it appear that he had obtained Love's authorization to quote without limitation from Love's paper. Moreover, Love's recovery is meager enough without requiring him to bear not only the fees but also the costs

of suit. Such a result would not only fail to deter infringement, but would actively encourage it. Those considerations are sufficient to warrant an award of full costs. Of course, the costs must be only those involved in pursuing the copyright claim, and may not involve those generated exclusively by the libel claim.

E. Injunctive Relief

Although this lawsuit started more than six years ago, and plaintiff at no time sought a temporary restraining order or a preliminary injunction, and although sales of "Endless Enemies" appear to have run their course, plaintiff now asks for a permanent injunction barring distribution of further infringing copies of "Endless Enemies" and directing the "reasonable disposition" of existing copies and "articles by means of which such copies . . . may be reproduced," pursuant to 17 U.S.C. § 503(b). Defendants argue that plaintiff should be denied such relief based on one of two equitable doctrines — either laches or estoppel arising from implied consent. However, as defendants concede, laches requires a showing of prejudice, and they have made none other than a general and entirely speculative reference to the hypothetical injury to those members of the reading public who may wish to buy the book but have not yet done so and are unable or unwilling to borrow a copy from a library. Moreover, the estoppel doctrine on which they rely proceeds from an inference of consent based on inaction, a legal fiction that seems particularly inappropriate in this case because plaintiff did, after all, demand an injunction in his complaint.

Whether or not one might find laches or estoppel in this record, I do not believe it is necessary for defendants to show either unless it is first clear that injunctive relief would be warranted. As Chief Judge Oakes pointed out in a recently published article, injunctive relief in unfair use copyright infringement cases is by no means automatic, even if it might be applied under ordinary circumstances. Oakes, "Copyrights and Copyremedies: Unfair Use and Injunctions," 38 J. COPR. SOC'Y. 63, 78-80

(1990). After all the opinions had been filed in *New Era Publications Int'l v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir.), *reh'g en banc denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, ____U.S.____, 110 S.Ct. 1168, 107 L.Ed. 2d 1071 (1990), it was clear that those in the majority and those in dissent agreed at least that an injunction remains a discretionary remedy under the Copyright Act. *Compare*, 884 F.2d at 661 ("Indeed, the discretionary nature of [an] injunction is apparent in the pertinent statutory provision: Any court having jurisdiction of a civil action arising under this title *may* . . . grant temporary and final injunctions . . . .") (emphasis in original), *with*, 884 F.2d at 663-64 ("The panel's holding demonstrates that its language is not to be understood as narrowing the equitable discretion as to the propriety of an injunction, which is conferred by statute.") (Newman, J., dissenting from denial of rehearing *en banc*).

There is no need in this case even to reach equitable issues unique to copyright cases. The outcome here is governed by first principles controlling issuance of injunctions in general, which the Supreme Court has articulated as follows:

> "It goes without saying that an injunction is an equitable remedy. It 'is not a remedy which issues as of course,' *Harrisonville v. W.S.Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-8 [53 S.Ct. 602, 603, 77 L.Ed. 1208] (1933), or 'to restrain an act the injurious consequences of which are merely trifling.' *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U.S. 296, 302 [20 S.Ct. 628, 630, 44 L.Ed. 777] (1900). An injunction should issue only where the intervention of a court of equity 'is essential in order effectually to protect property rights against injuries otherwise irremediable.' *Cavanaugh v. Looney*, 248 U.S. 453, 456 [39 S.Ct. 142, 143, 63 L.Ed. 354 (1919). The Court has repeatedly held that the basis for injunctive relief in the federal courts has always been irreparable injury and the inadequacy of legal remedies. *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 [95 S.Ct. 2069, 2077, 45 L.Ed.2d 12]

(1975); *Sampson v. Murray*, 415 U.S. 61, 88 [94 S.Ct. 937, 951, 39 L.Ed.2d 166] (1974); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-507 [79 S.Ct. 948, 954-55, 3 L.Ed.2d 988] (1959); *Hecht Co. v. Bowles*, [321 U.S. 321] 329 [64 S.Ct. 587, 591, 88 L.Ed. 754 (1944)]."

Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12, 102 S.Ct. 1798, 1803, 72 L.Ed. 2d 91 (1982). By that standard, no injunction is warranted here. Love has not explained what an injunction could accomplish at this stage of the litigation beyond a gratuitous slap at Kwitny. As noted above, "Endless Enemies" does not appear now to be a hot item, and the book is available in libraries for those still curious to read it. Love himself seems to have acknowledged the obvious by waiving any claim for his own lost profits: if there ever were such profits, they are gone and cannot be proved. In that circumstance, it is both impossible to conceive of a future market for Love's paper that would be protected by an injunction and impermissible to hallucinate one. When the injurious consequences to Love's copyright from continued circulation of Kwitny's book are, if anything, " 'trifling,' " *id.* at 312, 102 S.Ct. at 1803, no injunction is warranted whether or not laches or estoppel has been proved. Accordingly, none will issue.

II.

Plaintiff's motion for Rule 11 sanctions is supported, if that is the word, by some 87 pages of argument, of which the vast majority is given over to criticism of defendants' successful summary judgment motion which resulted in Judge Owen's dismissal of the libel claim. Indeed, it appears from a comparison of plaintiff's current briefs with the one he submitted to Judge Owen that for the most part he has simply taken the unsuccessful arguments he submitted to Judge Owen, reheated them to a rolling boil, and served them up as a Rule 11 motion.

This opinion would be prolonged unduly and the rights of other and more worthy litigants sacrificed inexcusably if I were

to respond to each of plaintiff's claims. It is useful, however, to examine one that captures the spirit and betrays the emptiness of plaintiff's submission. Plaintiff asserts that one paragraph of defendants' statement of uncontested facts submitted to Judge Owen pursuant to Rule 3(g) of this court's Civil Rules embodied "an act of dishonesty quite possibly unparalleled in the history of Federal-court litigation." (Mem. in Support of Plaintiff's Motion p. 8) This "ultimate act of dishonesty," we are told, "may well have been immensely damaging to plaintiff in the summary judgment proceeding . . . ." (*Id.* at p. 11)

The paragraph in question concerned the content of a *New York Times* story published in September 1980 which reported on a magazine article purporting to expose plaintiff as a CIA agent for his alleged role in the coup that overthrew the Mossadegh government, and plaintiff's response to that magazine article. According to the *Times*, Love attributed his failure to report on American involvement in the coup, "once he learned of it later in 1953," to "misguided patriotism." The offending paragraph in the Rule 3(g) statement said, in part: "Love is quoted in the article as stating that his involvement in the Iranian coup was a result of 'misguided patriotism.' "

When plaintiff objected to that paragraph, defendants amended it as follows:

> "With respect to the third sentence of Statement No. 24, the September 26 *New York Times* article states: 'He said his failure to report on American involvement in the coup, once he learned about it later in 1953, was a result of "misguided patriotism." '
>
> (DX 17)
>
> To the extent that the September 26 article uses the language 'his failure to report American involvement

> in the coup,' moving defendants hereby amend the third sentence of their Statement No. 24 to read accordingly. As amended, there can be no genuine dispute as to the facts set forth in the third sentence of Statement No. 24." (Lankenau Aff. Exh. P, p. 8)

Moreover, Judge Owen's enviably succinct opinion made it clear that he was under no misimpression as to the content of the *Times* story. He noted that it, "quoted Love as saying that 'his failure to report on American involvement in the coup . . . was a result of "misguided patriotism." ' " 1987 WL 5799, slip op. at 4.

Notwithstanding that the initial misstatement in defendants' Rule 3(g) statement was corrected, and that the misstatement obviously had no effect whatever on the result, plaintiff's Rule 11 motion papers do not disclose the correction, and suggest that the ellipses in Judge Owen's opinion constitute evidence that the judge "doctored" the record (Memorandum in Reply, p. 4), notwithstanding that all those ellipses signal is the omission of Love's self-serving and dubious suggestion that he was unaware of American involvement in the coup at a time when, according to his unpublished paper, he was witnessing that involvement. 706 F. Supp. at 1125. Although plaintiff now takes the position that the narrative in that paper must be read as describing not only what plaintiff witnessed during the events of August 1953 but also what he learned in the weeks and months thereafter, there was no reason based on the paper itself for Kwitny to have taken that position in his book and therefore no reason for Judge Owen to have taken it in his opinion.

Plaintiff justifies as follows his overwrought characterization of defendants' conduct with respect to the Rule 3(g) statement:

> "If one peruses the Rule 11 cases that have been decided in the past few years, one finds that almost all of them have to do with frivolous claims or

> pleadings. The undersigned was unable to find a single case in which a party had tampered with trial testimony or massively engaged in forwarding to the Court statements that were either factually false or for the assertion of which good grounds were lacking. Surely, if such a case existed, someone would have been tempted to ask for Rule 11 sanctions to be imposed. We therefore regard our earlier statement, that the manufactured confession constitutes 'an act of dishonesty quite possibly unparalleled in the history of Federal-court litigation', moving Memorandum, at 8, one that, of course, is not refuted in the opposing papers by any counterexample, as further substantiated by our researches." (*Id.* at p. 11)

Plaintiff was no more restrained in the relatively few pages of his memoranda discussing conduct relating to the copyright claim. Once again, one example will suffice. Plaintiff has taxed defense counsel with seeking to elicit testimony from experts to the effect that the particular narrative in Love's paper had value, apart from the facts it conveyed, as the words of a participant in significant events. This, plaintiff argues, was part of a dishonest stratagem to portray Love as a participant in the coup rather than as merely a witness, and thereby to elicit a ruling that might help in the defense of another of the libel actions Love has brought in connection with publication of "Endless Enemies," a stratagem wholly unrelated to the copyright case. (Memorandum in Support of Plaintiff's Motion pp. 28-32) This, we are told, was "fully on par" (Memorandum in Support of Plaintiff's Motion, pp. 31-32) with the (otherwise) "unparalleled" conduct discussed above.

Yet defense counsel's theory of a relationship between the testimony sought to be elicited and the copyright case was apparent, even if I did not subscribe to the theory and still do not. What defense counsel apparently tried to establish was some apparent necessity, or at least justification, for using Love's own words rather than merely the facts they conveyed, and thereby arguing that such use was "fair" within the meaning of the fair

use doctrine. The attempt failed, but that is a far cry from saying it violated Rule 11. Moreover, even if defendants were seeking simply for the sake of another libel action to portray Love as a participant in the events he wrote about in his paper rather than as a mere spectator, they could hardly have done better than Love's own words in his paper, where he wrote as follows of his encounter with royalist tanks at the radio station: "Incidentally, I, myself, was responsible, in an impromptu sort of way, for speeding the final victory of the royalists." (PX 5A, p.39)

This example illustrates two things. The first is that as between the parties, and particularly to plaintiff, the libel claim is the heart of the dispute; the copyright case was a sideshow. Plaintiff's focus at trial and now is on the libel claim. *See* 706 F. Supp. at 1130 (describing Love's testimony about his confrontation with Kwitny at the Downtown Athletic Club). The second is that plaintiff has condemned as a Rule 11 violation any suggested view or interpretation of the facts that differs from his own. Which is to say, what he objects to is advocacy by his opponent. Yet advocacy, even accompanied by occasional mistakes, is precisely what courts must be careful to protect even as they apply Rule 11. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 254 (2d Cir. 1985), *cert. denied*, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

Defendants have not formally cross-moved for Rule 11 sanctions, although they have pointed out that Rule 11 applies just as logically to a Rule 11 motion as it does to any other submission, *Nakash v. United States Dep't. of Justice*, 708 F. Supp. 1354, 1368 (S.D.N.Y. 1988), that the Rule permits a court to act *sua sponte*, and that I have so acted in the past. *Refac Int'l. Ltd. v. Lotus Development Corp.*, 1991 WL 50278 (S.D.N.Y. 1991). Defendants' counsel avers that he spent at least a week's time responding to the motion.

The implied invitation to act *mea sponte* is accepted only to the extent of a finding that plaintiff obviously has violated the Rule by filing a motion in which no reasonable lawyer could have found objective merit. Rather, the motion appears to have been crafted to serve two purposes extrinsic to the Rule: (i) to

litigate for a third time the merits of the libel motion on the off chance that Judge Owen's initial decision and his denial of reargument somehow could be undermined in aid of appeal, and (ii) to try to recover fees after a prior ruling in this case made it clear that no fees could be awarded under the Copyright Act, 1989 WL 140578, and after damage submissions made it equally clear that plaintiff's recovery would not be substantial.

However, no financial relief will be granted to compensate defendants for the time spent answering plaintiff's motion, principally because the motion is not only in substantial part a reheated version of plaintiff's position on defendants' summary judgment motion which defendants had already responded to, as set forth above, but is also probably a foretaste of plaintiff's position on appeal. Defendants' work product thus duplicates prior effort to a certain extent; and even to the extent it does not it probably will not have been wasted. This denial of attorney's fees is not a matter of no harm, no foul; rather, no harm, no foul deserving of any greater penalty than a finding that a foul has been committed.

* * * * * *

For the above reasons, plaintiff will recover of each of defendants the sums specified on the first page of this opinion, but will be granted no other relief.

SO ORDERED.

The material below this line did not appear in 772 F.Supp.

[Signed]

Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
August 26, 1991

OPINION AND ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

KENNETT LOVE,

Plaintiff,

-against-

88 CIV. 7562 (MBM)

CITY OF NEW YORK, Edward I. Koch, Mayor, DEPARTMENT OF GENERAL SERVICES (of the City of New York), Hadley W. Gould, Commissioner, WNYC COMMUNICATIONS GROUP, Mary Perot Nichols, President, Madison D. Lacy, Vice President and General Manager, Television, and JONATHAN KWITNY,

Defendants.

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MICHAEL B. MUKASEY, U.S.D.J.

Plaintiff Kennett Love is the author of an unpublished manuscript extensively quoted in defendant Jonathan Kwitny's book *Endless Enemies*, as discussed in this court's opinion and order dated February 21, 1989 in *Love* v. *Kwitny*, 84 Civ. 8289 (MBM), familiarity with which is assumed. Love's copyright for the manuscript was registered on October 23, 1984. In this action Love sues Kwitny for copyright infringement in April 1986 when Kwitny allegedly distributed 25 copies of his book in Colorado, and sues the City of New York and related defendants for distributing copies of Kwitny's book on June 16, 1988 to 12 viewers who selected it as their bonus for contributing $55 to WNYC Television, a publicly supported station. Defendants do not deny that these distributions occurred.

Love has moved for imposition of statutory damages and attorneys' fees pursuant to 17 U.S.C. §§ 504 (c) and 505[1] on the ground that the infringements at issue in this lawsuit occurred after the copyright was registered. The only obstacle to such imposition is 17 U.S.C. § 412 which reads, in relevant part:

> In any action under this title . . . no award of statutory damages or of attorney's fees, as provided by sections 504 and 505, shall be made for
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> (1) any infringement of copyright in an unpublished work commenced before the effective date of its registration

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[1] Section 504(c) permits a copyright owner to "elect . . . an award of statutory damages . . . of not less than $250 or more than $10,000," which may be increased to $50,000 on a finding of willful infringement. Section 505 permits an award of costs and "a reasonable attorney's fee to the prevailing party as part of the costs."

The issue on this motion is whether the infringements by Kwitny in April 1986 and by the City defendants in June 1988 are, as Love contends, separate from Kwitny's infringement in 1984, before Love registered the copyright, or whether they are a continuation of the infringement that was "commenced before the effective date of . . . registration."

In *Singh* v. *Famous Overseas, Inc.*, 680 F. Supp. 533 (E.D.N.Y. 1988) Judge Nickerson dealt with the same issue and decided that when infringing audio tape cassettes were sold before and after registration, the infringement had "commenced" before registration for purposes of § 412, the post-registration sales were not separate, and as a result plaintiff could not recover statutory damages and attorney's fees. He based his conclusion on both the language of § 412 and its underlying policy. He reasoned that although "infringement" can mean "both a single act of infringement and it can also mean several or continuous or repeated acts of infringement, it would be peculiar if not inaccurate to use the word 'commenced' to describe a single act. The verb generally presupposes as a subject some kind of activity that begins at one time and continues and reoccurs over time." 680 F. Supp at 535. Thus the statutory language supports the conclusion that infringement occurring both before registration and after registration must be said to have "commenced" before registration, such that the later infringement cannot give rise to statutory damages and attorney's fees.

As Judge Nickerson pointed out, the policy underlying the statute supports that conclusion, as follows:

> Since under the new legislation copyright registration would no longer be compulsory, Congress, deeming registration useful and important, sought some practical means of inducing it. The means chosen was to deny the "extraordinary" remedies of statutory damages and attorney's fees where registration is not promptly made. The threat of such a denial would hardly provide a significant motivation to register early if the owner of the work could obtain those

> remedies for acts of infringement taking place after a belated registration.

680 F. Supp. at 536. That analysis is dispositive here. Nor does it make any difference that the City defendants did not begin their infringement until after registration. It was the same infringement – distribution of *Endless Enemies* – that commenced before registration, and is no different conceptually from sale of an infringing book by one book store before registration and sale of the same book by another after registration.

Love argues that Kwitny's infringement in Colorado after he had been sued in *Love* v. *Kwitny*, *supra*, should be regarded as a new infringement, rather than as a continuation of the infringement that commenced before registration, because Kwitny had notice of an infringement claim. Nothing in the language or the history of § 412 recommends such a result.

Love argues that if defendants' view of § 412 is adopted an infringer can infringe far more extensively after registration than before, with relative impunity. The answer to that argument is that there are some remedies available to a plaintiff even against infringements that began before registration, including injunctive relief and actual damages. 17 U.S.C. §§ 502, 504 (b). Statutory damages and attorney's fees, however, were meant by Congress to reward prompt registration and cannot be made available in violation of that intent to the plaintiff who fails to act promptly.

For the reasons set forth above, and based on Judge Nickerson's analysis in *Singh*, Love's motion for statutory damages and attorney's fees must be denied.

SO ORDERED:

[Signed]

Michael B. Mukasey,
U.S. District Judge

Dated: New York, New York
November 17, 1989

Kennett LOVE, Plaintiff,

v.

Jonathan KWITNY, Congdon & Weed, Inc., St. Martin's Press, Inc., Book-of-the-Month Club, Inc., Barnes & Noble Bookstores, Inc., B. Dalton Company, Coliseum Books, Inc., Doubleday Doran Book Shops, Inc., and John Kelly, Defendants.

No. 84 Civ. 9289 (MBM).

United States District Court,
S.D. New York.

Feb. 21, 1989.

Stefan Bauer-Mengelberg, New York City, for plaintiff.

John C. Lankenau, Robert D. Balin Lankenau Kovner & Bickford, New York City, for defendants.

Author of copyrighted paper filed action for copyright infringement and libel against book author who quoted portions of work, as well as publisher and distributors of book. The District Court, Mukasey, J., held that: (1) book author's quotation of 50% of manuscript was outside scope of any license he obtained, and (2) unauthorized use of portions of unpublished manuscript was not fair use within the meaning of the copyright laws.

So ordered.

OPINION AND ORDER

MUKASEY, District Judge.

The facts underlying this copyright infringement action developed over more than thirty years, beginning with a journalist's involvement as observer and, slightly, as participant, in the August 1953 overthrow of the Iranian government headed by Prime Minister Mohammed Mossadegh. The dispute centers on an unpublished manuscript by that journalist, plaintiff Kennett Love, written in 1960. The manuscript describes events surrounding the overthrow and the restoration to power of the Pahlevi monarchy in the person of the Shah — in particular, facts suggesting strongly that this country's Central Intelligence Agency had a hand in the coup, and also that Love himself may have played a role in speeding the outcome of the battle that broke resistance in front of Mossadegh's house at the climax of the coup.

More than half of that unpublished manuscript was quoted verbatim in defendant Jonathan Kwitny's 1984 book, *Endless Enemies*, published and distributed by the remaining defendants.[1] Kwitny claims, and Love denies, that he had Love's consent to publish to the extent he did, and that in any event publication here was a fair use of Love's account within the meaning of the copyright statute. The case was tried to the court without a jury. Because I have found, after considering all the evidence and weighing the credibility of the witnesses, that Kwitny did not have Love's consent to use the work to the extent he did, and that the fair use doctrine does not protect the unauthorized publication here at issue, judgment will be entered for plaintiff as to liability. The parties agreed that the issue of damages would be tried separately, if necessary.

I.

In August 1953 plaintiff Kennett Love was the New York Times correspondent in Teheran who witnessed and reported on the overthrow of the Mossadegh government. In the spring of 1960, while studying at Princeton University, Love wrote a course paper entitled "The American Role in the Pahlevi Restoration" which, as its name suggests, treats several incidents Love saw at the time of the overthrow that reflected this country's involvement – through the activities of the CIA – in the August 1953 events.

In particular, Love describes being taken just before the climax of the coup by an American political attache, to whom he refers as a CIA man, to the home of another embassy official where he met Ardeshir Zahedi, the son of General Fazlollah Zahedi. The general would replace Dr. Mossadegh as part of the Pahlevi restoration. He saw there also a large copying machine that was being used to duplicate a royal

[1] The action has been discontinued with prejudice as to defendants Coliseum Books, Inc., Doubleday Doran Book Shops, Inc. and John Kelly. The action against defendant Congdon & Weed, Inc. has been stayed by order of the Bankruptcy Court.

decree or *firman* proclaiming General Zahedi to be prime minister, and took several copies to his hotel where he left them on the front desk. In the paper, Love recounts also the tactics employed by street gangs allegedly organized by another CIA agent and paid so handsomely in U.S. currency as to depress the dollar on Teheran currency markets for days after the coup.[2] Further, Love describes his own responsibility, "in an impromptu sort of way, for speeding the final victory of the royalists." This arose from his having encountered about a half dozen royalist tanks sitting idle at the radio station, where he had gone to broadcast a dispatch. He told their commanders of the battle then underway in front of Mossadegh's house, which was defended by three tanks, and suggested they join the fray. Love reports that they followed his suggestion, and turned the battle in favor of the royalist side. (Px 5A, p. 39)

These incidents, except for an unexplained drop in the dollar on Teheran currency markets, were not reported in the stories that appeared under Love's by-line in the New York Times.

In July 1966, while interviewing Allen W. Dulles, then former director of the CIA, in connection with a book on the 1956 Suez crisis, Love mentioned his 1960 paper. Dulles expressed his interest, and within the week Love sent him a copy. Dulles apparently placed Love's paper in his files. When the retired CIA director died in 1969, he left those files, including Love's paper, to Princeton University, where they were housed in the Seeley Mudd Manuscript Library. That library permits access to the Dulles papers only upon agreement that any article based on those papers be cleared in advance, and copies onto each page of those papers duplicated for a researcher the following notice:

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[2] In this respect Love's account differs from another that purports to describe CIA involvement in the coup: "The CIA provided $1 million in Iranian currency, which [Kermit] Roosevelt had stored in a large safe – a bulky cache since the largest banknotes then available – the 500-rial denomination – were worth only $7.50. Of this sum, $100,000 was given to the two Iranian agents to disburse among the athletic club thugs and the poor of the south Tehran slums." B. Rubin, *Paved With Good Intentions: The American Experience and Iran* 82 (1981).

> "The U.S. Copyright Law (Title 17j[17], U.S.Code) governs the making of photocopies of copyrighted material. The person making use of this photocopy is liable for any infringement of the Copyright Law. Manuscripts copied from THE ALLEN DULLES PAPERS in the Princeton University Library are not to be reproduced or published without the permission of the Library."

Love testified that he took particular care to assure that any use made of his work, including the unpublished Princeton paper, was accurate in his view and that he would generally review any such proposed use as the price of granting his permission. In the spring and summer of 1980 Professor Barry Rubin of Georgetown University sought and received Love's permission to cite the paper in limited fashion in his book, *supra* at n. 2, but only after Love had reviewed and edited the proposed segments, including Rubin's bibliographic citation to Love's paper. Love made it a point to assure that the citation did not create the impression Love had written the paper for Dulles or the CIA. (Px 11) He testified also to having taken particular care before giving permission to quote his paper in two other works. (Tr. 354)

In his concern about being connected with the CIA, Love seems to have been prescient. In September 1980 the magazine CounterSpy, which prides itself, if that is the term, on exposing CIA agents, heralded its monthly issue with a press conference to announce an article purporting to expose Love as a CIA agent, based on the 1960 paper. The magazine also quoted large segments of the paper, without Love's authorization. Apparently, CounterSpy editor John Kelly had obtained a copy of the paper without complying with the restrictions imposed by the library. Love denied then and still does that he acted as such an operative. CounterSpy's purported revelation and denials by both Love and Times personnel received brief press attention. In one of those stories, which appeared in The New York Times on September 26, 1980, Love was quoted as having attributed to "misguided patriotism" his failure to report on the American involvement in the coup, although the

article suggested his knowledge of such involvement did not come until later in 1953.[3]

In the summer of 1981, Jonathan Kwitny, then a Wall Street Journal reporter and by then the author of four books, began work on *Endless Enemies* under contract to Congdon & Weed; he continued to work on it, doing "relatively little" else, until it was published in 1984. The thesis of the book is that U.S. policy around the world, and occasionally at home, is often guided by misperceptions of where this country's real interests lie and who and what are the real dangers that confront it. As Kwitny would have it, these misperceptions are frequently induced by multinational corporations, particularly oil companies, and people they have hired or otherwise influenced. He argues that the press fails to correct and in fact reinforces these misperceptions. Kwitny attributes to the policy makers and journalists he faults a world view in which this country is beset continually by what the author believes are imaginary threats -- *i.e.*, paranoid visions of "endless enemies."

Kwitny had read Rubin's book and obtained from Kelly of CounterSpy a copy of the Love manuscript purloined from the Princeton library. The manuscript suited Kwitny well, reflecting as it did both this country's involvement in what he argues was a counterproductive battle against an imaginary threat, and the press' failure to report that involvement. He set about trying to reach Love, following a lead provided by a New

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[3] Love insisted at trial that, notwithstanding the contents of his 1960 paper, he was unaware in August 1953 of CIA involvement in the coup. He conceded that in 1954 he had written to Times foreign editor Emanuel Freedman explaining that he had omitted from his Times dispatches evidence of U.S. involvement in Iran because such evidence would have been "too good grist for the Russian propaganda mill." (Tr. 125) At trial, however, he claimed he had simply been trying in such correspondence to provoke his editor into making him pursue the story. He testified that the Times had shown itself uninterested in any reports that might have disclosed covert U.S. activities, and insisted that whatever "misguided patriotism" there had been in not reporting fully on events in Iran had been that of his colleague in the Middle East Robert Doty and "the entire top level of The New York Times, beginning with Manny Freedman and up." (Tr. 156)

York Times story about the CounterSpy article in 1980 which reported that Love had a house in East Hampton. According to Kwitny, he tried repeatedly to reach Love at the East Hampton number he received from the telephone company. Kwitny testified that he got no answer until, to his surprise, Love picked up the receiver at about 9:30 on the morning of February 21, 1983, the date of the Washington's Birthday holiday that year. Kwitny testified that he had called so often without receiving an answer that when he finally reached Love he had not prepared himself with a blank piece of paper on which to take notes. He seized a page from his own manuscript and took notes on the back. Kwitny testified that he was then aware of his wish to quote "substantially" from Love's manuscript and so informed Love, who gave his consent to such quotation. (Tr. 177, 199) Kwitny said at trial that he had been conscious of a potential libel problem if he did not convey accurately what Love had written in the manuscript, apparently in that Kwitny would deal harshly with Love for failing to include in his New York Times stories the account of U.S. (and his own) involvement in the 1953 events in Teheran, and that he had to quote extensively from Love's paper in order to give readers the "full flavor" and to offer a talisman of his own good faith to potentially disbelieving readers. (Tr. 170-171)

The notes include Love's East Hampton post office box number, an item of information not available in any public listing, and reflect that during the conversation Love said he had "never tried to publish" the manuscript, and that he "[m]ay use it in a book but haven't gotten around to it." The notes, insofar as they deal with the subject of Love's authorization to Kwitny to use his paper, read in their entirety as follows: "Told I may quote—With credit. 'Fine.' Several times say I intend to quote some of this." (Dx B) The word "substantially," or a term of similar import, appears nowhere in the notes.

Love denied vehemently at trial not only that he had ever given authorization to Kwitny to quote "substantially" from his 1960 manuscript, but that the conversation had taken place at all. Although he had conceded on earlier occasions that Kwitny might have called him, by the time of trial his recollection

had hardened into an oft-reiterated certainty that, "There was no phone conversation." (Tr. 339; see also, Tr. 65, 338, 340, 341, 344) In support of his denial, Love testified elaborately to alleged circumstances that would have him living in another house at the time, in the nearby town of Sagaponack, rather than in his East Hampton house where the pipes had frozen. He recounted in some detail why he could recall making certain calendar notes that day in Sagaponack rather than in East Hampton. The details of this denial might be relevant were it not for a single and dispositive piece of evidence as to whether the conversation took place. Kwitny's telephone bill, secured directly from the telephone company, reflects a 15-minute call on the morning in question to Love's East Hampton number. The powerful force of this evidence is enhanced by the presence of Love's post office box number in Kwitny's notes, information that could not have come from any source demonstrably available to Kwitny other than Love himself. Because it defies belief that Kwitny spent 15 minutes in conversation with a workman on the premises or in the mute grasp of a malfunctioning answering machine,* and that he sought to enhance the credibility of fabricated notes by obtaining Love's post office box number from some undisclosed source while neglecting to include in such notes evidence to support his claim that Love authorized "substantial" quotation from the paper, it is apparent that, notwithstanding Love's denials, there was a phone conversation. The contents of that conversation, however, can be determined only after considering other evidence.

Chapter Ten of Kwitny's book, entitled "Upsetting the Balance: Iran and Afghanistan," develops the thesis that the CIA, at the behest of Rockefeller and other oil interests, staged a coup in August 1953 to overthrow Mossadegh, a mere eccentric nationalist and Anglophobe mistaken for a Soviet pawn,

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* Love apparently intended to pursue this theory at trial, but then waived it. (Tr. 335-37)

and bring to power a violently repressive monarchy. This sowed the seeds of anti-Americanism among the Iranians, and led a quarter century later to the ghastly harvest of the Khomeini regime with resulting denial of Iranian oil to U.S. markets, and local weakness that paved the way for the Soviet invasion of Afghanistan, a process that went unreported in the United States. Of the 26 pages given over to developing this thesis, about half are devoted to lengthy quotations from Love's manuscript, cited as support for the thesis.

Here it bears mention that insofar as Kwitny appears to argue that the U.S. role in overthrowing Mossadegh and restoring the Shah's power incurred the enmity of the Iranians, his view and Love's as expressed in the 1960 paper are consistent, as the following segment, quoted by Kwitny, makes plain:

> "What is significant is that Americans restored the Pahlevi monarchy when it threatened to give way before a premier dependent on communist support and that Iranians are well aware of the American role although the American public is not. Thus it is that many Iranians hold the United States responsible for creating and supporting a regime that they believe has become an increasingly malign influence on the political, social and economic life of the country." (Px 5A, p. 41, quoted in *Endless Enemies* at 176-77. As therein quoted, the last sentence is italicized.)

Kwitny quoted not only Love's description of events and incidents relating immediately to the August 1953 coup, but also Love's analysis of the underlying political and social conditions in Iran – that country's dispute with the Anglo-Iranian Oil Company; Mossadegh's views and goals; the strengths and strategy of Tudeh, the Iranian communist party – as well as Love's version of U.S. policy toward Iran and his speculation about Soviet intentions in that part of the world.

More than 50 percent of the words in Love's paper are quoted in Chapter Ten of Kwitny's book, interrupted intermittently by pauses to provide facts that do not appear in Love's text,

to insert arch and sometimes humorous asides of which many deride Love,[5] and, occasionally, to summarize rather than quote Love's account. Kwitny italicizes Love's text repeatedly to emphasize portions that he believes support his thesis.

Although Kwitny and Love appear to hold at least congruent if not identical views about the 1953 events in Iran and their consequences, Kwitny presents Love as at best an unwitting tool of the CIA, if not an actual agency hireling, and as a traitor to his profession for failing to report what he knew and did. Thus, before his lenghtly quotation from Love's paper, Kwitny describes it as having been "submitted" to Dulles (as opposed to having been sent at his request about six years after it was first written), reports Love's denial "that he was ever actually employed by the CIA" (Kwitny at p. 160), and adds that he can "pretty well accept the *Time*'s word that it wasn't paying him on behalf of the CIA." (*Id.*) He then concludes that Love "later explained, rather lamely perhaps, that he acted as he did because of 'misguided patriotism,' " (Kwitny at 160-61), a reference either to his own conversation with Love or to the September 26, 1980 New York Times article following the CounterSpy imbroglio[6]. Of Love's suggestion to the royalist commanders at the radio station that their tanks might be useful

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[5] For example, after quoting Love's description of his cordial reception at a large and disciplined Tudeh rally and the organizers' willingness to give him a grandstand view, Kwitny interjects that "maybe they wouldn't have [accommodated Love] if they had known he was getting ready to take an active, covert part in a CIA coup." Kwitny at p. 170. Love refers to two people who operated the copying machine to duplicate copies of the firman at the home of the unidentified U.S. attache, of whom Kwitny writes: "[Apparently these were U.S. government employees; our Iranian stooges couldn't even churn out their own propoganda.]" Kwitny at p. 172.

[6] Kwitny does not discuss how Love's failure to report what he saw and did in Teheran, and his newspaper's decision not to pursue the story, if there was such a decision, compared to journalistic practice at the time—*i.e.*, 1953, as distinct from 1984, when Kwitny published his book. There is substantial evidence for the proposition that it was once accepted for journalists not

(Footnote continued)

at an engagement then in progress at Mossadegh's residence, and their later defeat of the armor protecting that residence, Kwitny wrote as follows:

> "And there we have it, folks – the Iranian correspondent for the *New York Times* directing the successful tank attack on the home of the Iranian prime minister, overthrowing the government, fixing one-man rule in Iran, and setting off a chain of events that would include the loss of Iranian oil to U.S. markets and the invasion of Afghanistan by the Soviet Union." (Kwitny, at 176)

As the publication date for *Endless Enemies* neared, the book was reviewed by counsel, who apparently recommended that Kwitny memorialize or confirm that he had received Love's permission to quote as extensively as he did. Describing his conversations with counsel, Kwitny testified, "I remember she

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to print information they believed disserved the national interest. Thus, for example, Thomas P. ("Tip") O'Neill, the former Speaker of the House of Representatives, reports that in 1934 he pursued the invitation of his Boston acquaintance Missy LeHand, President Roosevelt's secretary, to visit the White House when he was in Washington, and was shown into the President's office where he was "shocked" to see Roosevelt in a wheel chair. "Like most Americans, I had absolutely no idea that Franklin Roosevelt was disabled. It's hard to imagine in this age of television, but in those days the president's handicap was kept secret out of respect for the office." T. O'Neill & W. Novak, *Man of the House* 3 (1987). Such journalistic self-censorship is referred to in a section headed "Another Era" in F. Friendly & M. Elliott, *The Constitution: That Delicate Balance* 54-55 (1984). Perhaps the most famous example of the practice, and the one generally conceded to have ended it, was the decision by the editors of The New York Times in 1961 not to report on the then imminent Bay of Pigs invasion. *See* T. Szulc, "*The New York Times* and the Bay of Pigs" in D. Brown & W.R. Bruner, eds., *How I Got That Story* 315-29 (1967). A year later, the editors of the Times agreed to withhold for 24 hours at President Kennedy's request news of the developing Cuban missile crisis, but only after the President promised, in the words of Times editor Max Frankel, to "shed no blood and start no war during the period of our silence." Frankel, *A Washington Education*, The Columbia Forum 10 (Winter 1973). "No such bargain was ever struck again, though many officials made overtures. The essential ingredient was trust, and that was lost somewhere between Dallas and Tonkin." *Id.*

[counsel] said that there is a substantial amount [of Love's paper], there is a lot of it [quoted in Kwitny's book], so we ought to have something in writing." (Tr. 267) Kwitny did the initial draft of the letter, which was then reviewed and approved by counsel. The letter was dated February 8, 1984 and was addressed to Love at his East Hampton post office box, the address that appears on Kwitny's notes of his February 21, 1983 telephone conversation with Love. By the time the letter was sent, the book was in galleys and Kwitny's editor had already expressed his intention to publish by May "by means of a very fast crash schedule (with a premium paid for fast typesetting)." (Px 50) The full text of the letter, which Kwitny argues confirms a conversation about a year earlier in which he received Love's approval to use "substantial" portions of the 1960 paper, is as follows:

> "Since nearly a year has passed since our phone conversation last February 21, I wanted to touch base, first to repeat my respect for your work as the most vivid and detailed account I have found of the events in Iran in 1953 and to thank you again for your cooperation in helping make this knowledge public, and second, to make sure there hasn't been some change either in your personal status or in your knowledge of Iranian events that should be accounted for in my book.
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> "Although these old events in Iran are only a small portion of the book I've done, which is global in scope, they make an interesting interlude largely because of the kind of detail your 1960 account has helped provide. I want to assure you again that the passages I have selected to use are clearly marked off as quotes and credited to you in the text. I only wish there was more room to print more of it.
>
> "Please let me know if any further information regarding those events has come to your attention. Thank you very much for your help.
>
> "Sincerely,"

Kwitny testified that he and his counsel shared amusement at the sentence, "I only wish there was more room to print more of it." (Tr. 268) Both realized that the book contained a damning indictment of Love's journalistic ethics, and that the quoted sentence, although perhaps literally true, would convey precisely the opposite impression from the book, suggesting to Love that Kwitny had praised him. As to the effect that sentence might have on Love's perception of how much of his paper Kwitny intended to use, Kwitny testified that although the very purpose of the letter was to get "something in writing" confirming Love's alleged agreement to let Kwitny use "substantial" portions of his paper, "If anything was said along that line it would have been minor. Our genuine concern was that obviously if this guy realized how this stuff would make him look in light of what his own stories had reported, he would become, as he did, terribly upset, and he might not have gone along with so openly consenting to having this used." (Tr. 269-70)

The letter bears Kwitny's return address. Love, consistent with his untenable claim that the February 21 conversation never took place, acknowledged he received the letter but claimed he had no idea what conversation it referred to. He never responded to the letter.

The book was published in mid-1984. In early October 1984 Love encountered Kwitny at the New York Athletic Club during a reception both were attending in honor of representatives of the Nicaraguan Sandinistas. (Dx N) Love testified to the confrontation with great emotion at trial, struggling to peer around his lawyer at the defendant because, "I like to look at Mr. Kwitny while I am telling this." (Tr. 348) Love accused Kwitny of both stealing his words and failing to believe them.

> "...I said, 'I don't understand it, Mr. Kwitny. You went to the University of Missouri'—...'I am from Missouri.' I said, 'We are both journalists, we were both in the Peace Corps at about the same time, our politics seem to be about the same. Why are you doing this to me, Mr. Kwitny?' He said, 'I am terribly sorry, I cannot talk to you now. I have to go get on

> the receiving line. I hope we can meet in happier circumstances.' My last words to him were, 'I assure you, Mr. Kwitny, we will not.' " (*Id.*)

On October 23, 1984 Love registered the copyright for his 1960 paper. In December 1984, he commenced this action. He sued initially for libel as well as copyright infringement, but his libel claim was dismissed on motion by Judge Owen before the case was transferred to my docket.

Endless Enemies was one of two runners-up for a Pulitzer Prize in 1985 in the "General Nonfiction" category. Kwitny testified that although the book was a critical success, he made no money on it. The publisher, Congdon & Weed, is now in bankruptcy.

II.

Kwitny argues principally that he had Love's permission to quote as he did, citing the February 21, 1983 conversation and his February 8, 1984 letter to Love. Although I do not accept Love's confected denial of the conversation, neither can I accept Kwitny's claim that he received Love's permission to quote "substantial" portions of the paper. It is plain that one of Kwitny's major goals in contacting Love was to secure his consent to use the unpublished work, and that Kwitny took notes of the conversation with full awareness of the significance those notes might have at a later date. He took particular care to note Love's consent, to the extent he gave it—"Told I may quote—With credit. 'Fine.' "—and to squeeze into his notes (Tr. 179) "Several times say I intend to quote some of this." (Dx B) If he had said anything to the effect that his quotation would be substantial, as he testified at trial, that word or one of similar import would have appeared in his notes.

Moreover, those portions of his notes reflecting that Love consented to have his paper quoted must be reconciled with other portions of the notes, particularly with the entry, "May use it [the paper] in a book but haven't gotten around to it." Any consent Love gave during that conversation would have

to be read, absent other evidence, as no greater than would permit him to use the paper himself at a later date in a book, should he choose to do so. As set forth more extensively below, Kwitny's verbatim quotation of more than half the paper, and by far the most significant portion of the paper, is entirely inconsistent with such later use by Love.

Rejecting Love's insistence that the February 21, 1983 conversation never happened does not necessarily mean that I must accept Kwitny's version of that conversation. To be sure, there is always the possibility that Love lied outright at trial about the conversation in an attempt to conceal his authorization to Kwitny to copy "substantial" parts of his paper. But the available evidence, particularly Kwitny's notes, suggests more strongly to me that Love's denial resulted either from self-delusion or from the erroneous belief that admission of any degree of authorization during that conversation would automatically lose the case. Neither inference is particularly to Love's credit, but neither compels a finding in Kwitny's favor.

Kwitny's February 8, 1984 letter does not change and in fact reinforces my conclusion about the February 21, 1983 telephone call. In particular, the two-edged sentence that was a source of amusement to Kwitny and his lawyer—"I only wish there was room to print more of it"—because they but not Love were aware that Kwitny's only regret was the inability to criticize Love even more harshly, could only minimize in Love's mind how much of his paper was to be quoted. The above sentence and the observation that "those old events in Iran are only a small portion of the book I've done," are the only two statements in the letter that provide any suggestion of volume. Together, they add up to a half truth tending strongly, in the manner of such fractional verities, to mislead anyone who does not know the other half. In no sense do they convey or confirm an intent to print verbatim half by volume, and far more by figurative weight, of Love's 41-page paper. Accordingly, Love's failure to respond cannot be read as consent to such quotation.

[1] Kwitny argues that Love granted him an oral nonexclusive license. Although a copyright holder may license another party

to use copyrighted material, the defendant must show that he did not exceed the scope of the license. *Power Lawn Mower Parts, Inc. v. Lawn Mower Parts, Inc.*, [1981-83] Copyright L.Dec. (CCH) ¶ 25,317 at 16,796, 16, 798 (W.D.N.Y. August 24, 1981) [1981 WL 1381]. *See also Gilliam v. American Broadcasting Co.*, 538 F.2d 14, 20 (2d Cir.1976). As I have shown, any consent Love gave during that conversation was limited to small excerpts such as would enable Love to publish the paper in the future. Kwitny's verbatim quotation of 50% of the manuscript is, by his own account in his notes of the specifics of the license, outside its scope.

Alternatively, the defense of consent may be viewed as part of the defense of equitable estoppel. Kwitny, however, fares not better here. "It is well settled that 'consent, whether *express* or implied from long acquiescence with knowledge of the infringement, will prevent relief in equity on the principal of estoppel.'" *Wiegand Co. v. E. Trent Co.*, 122 F.2d 920, 925 (3rd Cir.1941) (citation omitted) (emphasis added), *cert. denied*, 316 U.S. 667, 62 S.Ct. 1033, 86 L.Ed. 1743 (1942). *See also*, N. Boorstyn, *Copyright Law* § 10.25 at 311 (1981) ("To establish the defense of estoppel, the defendant must show that plaintiff knew of defendant's infringing acts, *expressly* or impliedly consented to such acts through inaction or *acquiescence*. . . .)

[2] The requirements for such an estoppel, used by the Ninth Circuit in *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100 (9th Cir.), *cert. denied*, 364 U.S. 882, 81 S.Ct. 170, 5 L.Ed.2d 103 (1960), and adopted by this Circuit in *Lottie Joplin Thomas v. Crown Pub.*, 456 F.Supp. 531 (S.D.N.Y.1977), *aff'd*, 592 F.2d 651 (2d Cir.1978), are:

> (1) the party to be estopped must know the facts of the defendant's infringing conduct;
>
> (2) he must intend that his conduct shall be acted on or must so act that the party asserting estoppel has a right to believe that it is so intended;
>
> (3) the defendant must be ignorant of the true facts, and

(4) he must rely on the plaintiff's conduct to his injury.

3 M. Nimmer, *Nimmer on Copyright* § 13.07 at 13-133 (1988). Although these principles are most often applied to situations involving implied consent arising from inaction over a long period of time, they may be applied with slight and obvious alteration to situations involving express consent. For example, the defendant who argues express consent need not be "ignorant of the true facts." Otherwise, these principles may be applied comfortably to cases involving express oral consent. *Freedman v. Select Information Systems, Inc.*, 221 U.S.P.Q. 848 (N.D.Cal. Jan. 30, 1983) [1983 WL 270] (applying estoppel principles when defendant claimed right to distribute copyrighted computer software as result of "oral license" from plaintiff). Applying those principles here, I find that there was no basis for Love to know as the result of either the February 21, 1983 telephone conversation or Kwitny's February 8, 1984 letter, or both, that Kwitny intended to quote a substantial part of his paper in *Endless Enemies*. Accordingly, Kwitny had no right to believe he had been authorized to quote the paper to the extent he did.

III.

Having concluded that Kwitny did not have Love's permission to quote the paper to the extent he did, I must consider Kwitny's claim that his publication nonetheless is protected by the "fair use" doctrine as codified in the Copyright Act, 17 U.S.C. § 107 (1982). Although the 1976 Copyright Act preempted common law copyright, 17 U.S.C. § 301(a), and extended statutory protection to unpublished works, § 107 provides that "fair use" does not infringe a copyright, and gives examples of such use as well as four non-exclusive factors to be considered in determining whether a particular challenged use is a fair use.[7] "This approach was 'intended to restate the

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[7] 17 U.S.C. § 107 provides as follows:

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phono-records or by any other means specified by that section, for purposes such as criticism, comment, news reporting,

(Footnote continued)

[pre-existing judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.' " *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 549, 105 S.Ct. 2218, 2225, 85 L.Ed.2d 588 (1985) (quoting H.R. Rep. No. 1476, 94th Cong., 2d Sess. 66 (1976), *reprinted in* 1976 U.S.Code Cong. & Admin.News 5659, 5680).

The fair use doctrine, "firmly planted in the early English common law," *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1259 (2d Cir.1986), *cert. denied*, 481 U.S. 1059, 107 S.Ct. 2201, 95 L.Ed.2d 856 (1987), permits others than the copyright owner to use copyrighted material without the owner's consent. Its justification lies in the very purpose of copyright protection—"to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const., art. I § 8. The fair use doctrine promotes that goal by defining instances when the law will " 'subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.' " *Rosemont Enter., Inc. v. Random House, Inc.* 366 F.2d 303, 307 (2d Cir.1966) (quoting *Berlin v. E.C. Publications Inc.* 329 F.2d 541, 544 (2d Cir.1964)), *cert. denied*, 385 U.S. 1009, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967).

These principles underlie the four factors enumerated in the statute, which do not so much define fair use as provide subjects to consider in determining when it is present. *New Era*

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teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Publications Int'l v. Henry Holt and Co., 695 F.Supp. 1493, 1499 (S.D.N.Y. 1988). Although "the fair use determination often requires a complex and subtle evaluation of numerous mixed issues of fact and law," *Maxtone*, 803 F.2d at 1259, and the statute itself was drafted so as to leave courts free to adapt the doctrine as the facts may require, *id.* at 1260, such that extensive analysis is often necessary, *see, e.g.*, *New Era*, that is not to say that there is no such thing as a straightforward case that can be resolved by considering the four factors Congress has gleaned from the common law. This is such a case.

1. *Purpose and Character of the Use* – Here Kwitny argues, and I agree, that his book may be considered in any of several categories commonly regarded as potentially fair use, and enumerated in the statute, including criticism, comment, scholarship and, notwithstanding the time lapse between the underlying events and the book, news reporting. Nor is the fact that Kwitny's use of the material was for a commercial rather than a nonprofit purpose a basis for finding that this factor necessarily weighs against him. *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir.) *cert. denied*, — U.S. — , 108 S.Ct. 213, 98 L.Ed.2d 177 (1987); *Maxtone*, 803 F.2d at 1262.

[3] However, Kwitny next invites a leap that the cases do not justify and that I am unwilling to make. He argues in essence that because his treatment of both Love's account and his conduct may be viewed as criticism, comment, scholarship and news reporting, he was either compelled or entitled to use a huge proportion of Love's protected words to make his point. (Tr. 170-71) That Kwitny considered Love's account "astonishing and telling," wanted to give his readers "the full flavor," and sought to dispel disbelief by using another author's account to lend "an air of authenticity to the facts that are in it," does not make his use "fair" for copyright purposes. The dilemma posed by a choice between copying and the risk of distortion was considered by the Second Circuit explicitly in *Salinger* and found insufficient to justify a decision to copy. As the court noted in that case, "the copyright owner secures protection only for the expressive content of the work, not the ideas or facts contained therein, [citation omitted] a distinction fundamental to copyright law and of special significance in determining

whether infringement has occurred in a work of . . . historical or contemporary events." *Salinger*, 811 F.2d at 95. Accordingly, "[t]his dilemma [distortion or copying] is not faced by the [author] who elects to copy only the factual content of [a protected work]. The [author] who copies only facts incurs no risk of [liability]; he has not taken copyrighted material." *Salinger*, 811 F.2d at 96. Kwitny was perfectly free to use with impunity the facts Love presented in his paper, including the facts surrounding Love's own conduct. He was not free to use Love's own words.

The expert academic testimony Kwitny offered at trial as to how important the disclosures in Love's paper are to an understanding of events in Iran does not generate a different result. What is important are the facts, which are separate from Love's narration of them. The facts are not protected by copyright; the narration is. To the extent that the expert testimony offered by Kwitny conflicted with those principles, and asserted that the narration was somehow crucial, it was, in my view, mere *ipse dixit*.

[4] Kwitny presented at trial an additional justification that warrants no greater protection from a copyright infringement claim than the one rejected in *Salinger:*

> "And another reason [for using extensive quotations], quite frankly, was that I have become very conscious over the years of libel and the problems that it raises, and I have learned that by quoting a person's own words you can avoid libel problems. I wanted it very clear that this is what he said, that I wasn't paraphrasing, I wasn't making this up, these were his own words." (Tr. 171)

Once again, Kwitny could protect himself from a successful libel claim by reporting facts accurately, or at least accurately enough to survive the allegation that he acted "in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch*, 38

N.Y.2d 196, 199, 341 N.E.2d 569, 572, 379 N.Y.S.2d 61, 64 (1975).[6] It is not that it is unfair to use a man's own words against him, simply that poetic justice is not the sort of fairness protected by the doctrine of "fair use."

Thus, although the purpose of the use in Kwitny's book may count in his favor it provides no particularly compelling justification for substantial use of Love's copyrighted words.

[5] 2. *Nature of the Copyrighted Work*—This factor weighs heavily in Love's favor because the copyrighted work in this case was unpublished. "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." *Harper*, 471 U.S. at 555, 105 S.Ct. at 2228.

Kwitny insists that these are not "ordinary circumstances" essentially for three reasons: first, that Love's paper is fact rather than fiction; second, that Love did give copies of his paper to certain persons, and thus the paper, although Kwitny does not argue that it has been published, is not quite as unpublished as, say, the private letters in *Salinger;* third, that Love's paper and Kwitny's book serve different purposes.

[6] The first of these reasons requires little discussion. That Love's words described facts did not warrant using his words, particularly when there was nothing to stop use of the facts he presented. *Salinger*, 811 F.2d at 96.

[7] Second, I conclude from the evidence at trial that Love's distribution of the paper to two professors at Princeton, and to Allen Dulles, and his permission to professors Rubin, Dorman, Farhang and Gasiorowski to use particular portions of the paper cannot be construed as dedicating his paper to wholesale use in the academic or any other community. Indeed, the restrictions he placed on Professor Rubin's use of the paper, even as

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[6] There is no doubt that the subjects Kwitny wrote about are "arguably within the sphere of legitimate public concern, which is reasonably related to matters warranting public exposition," *id.*, so as to warrant applying the *Chapadeau* standard.

to the form used to cite it, suggest Love intended to retain control over its use. Kwitny's own notes reflect that Love was still considering in 1983 using his paper in a book. As to Kwitny's suggestion that Love's failure to sue CounterSpy for its unauthorized publication of excerpts from the paper, Love provided a perfectly credible explanation at trial: he believed the magazine was judgment proof. *Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142 (2d Cir.1984), involving a letter to the editor which, although unpublished, was intended by its author to be published, does not control here.

The third argument, that the two works serve different functions, is to a substantial degree incorrect and, to the extent correct, is insufficient. Here Kwitny's own introduction to approximately 16 pages that consist mostly of Love's words makes the point nicely: "The best record of how this repression of Iranian independence started comes from the pen of Kennett Love, who was the *New York Times* reporter in Iran in 1953." Kwitny at 160. That is to say, Kwitny relies heavily in his book on Love's account to describe for his readers what happened at the time. To that extent, the two works serve the identical function. That Kwitny also criticizes Love, the CIA and others cannot itself deprive Love's paper of the protection ordinarily given to unpublished works. To do otherwise would be to create an exception that would swallow the rule.

3. *Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*—By any test, this factor must be counted overwhelmingly in Love's favor. Kwitny used more than half the words in Love's unpublished paper, but even this large amount does not begin to measure the substantiality of the taking. I have found it instructive to mark those portions of Love's paper quoted in Kwitny's book and then to read what remains. Eliminating connecting phrases and matter that simply restates or elaborates slightly what is quoted, what remains is a brief description of Iranian politics and U.S.-Iran relations during and just after World War II, of the sort one might find in a textbook, and the author's analysis of the options facing the United States just before the coup. What remains would not justify the title of the paper, "The American

Role in the Pahlevi Restoration." If what the Supreme Court refused to permit in *Harper & Row* was a taking of "essentially the heart of the book," 471 U.S. at 564-65, 105 S.Ct. at 2233, the taking here involves nearly every vital organ of the paper.

Although Kwitny does not seem to argue the point explicitly, I am mindful of the fact that the substantiality of the unauthorized quotation must be measured not against zero but against what I have found Love permitted, as reflected in Kwitny's notes of the February 21, 1983 conversation and his February 8, 1984 letter to Love—*i.e.*, that Love said he "May use it [the paper] in a book but haven't gotten around to it," and Kwitny "Told I may quote—With credit. 'Fine.' Several times say I intend to quote some of this," (Dx B); as well as, "I want to assure you again that the passages I have selected to use are clearly marked off as quotes and credited to you in the text. I only wish there was room to print more of it." (Dx C) To be sure, that would not provide a clear standard against which to measure a claim of slight excess in quotation. But in this case what has been taken is more than "some of" a paper Kwitny was aware Love might wish to use in a book at a later date, particularly attended by Kwitny's expressed regret that there was not room for more. I have no difficulty finding that there was substantial unauthorized quotation beyond what any reasonable author would have expected based on the exchange between Kwitny and Love.

[8] 4. *Effect Upon the Potential Market for or Value of the Copyrighted Work*—This is the single most important factor to consider in determining whether a particular unauthorized use has been fair, because fairness must include no material impairment of the marketability of a copied work. *Harper & Row*, 471 U.S. at 566-67, 105 S.Ct. at 2233-34.

[9] Kwitny argues that the record reflects no more than "uncrystallized plans" by Love to publish the paper, *Maxtone*, 803 F.2d at 1264, and offers the bland assurance that Love apparently never intended to publish his paper and that even such uncrystallized plans as he expressed could not be materially impeded because the market for a criticism of Love's paper is different from the market for Love's paper itself. Yet even assuming

arguendo that Love, contrary to what he told Kwitny, did not intend to publish his paper in any form, he "has the right to change his mind. He is entitled to protect his *opportunity* to sell" his paper. *Salinger*, 811 F.2d at 99 (emphasis in original). Nor do I see any basis to slice the market as Kwitny proposes so as to differentiate those interested in reading Kwitny's views and Love's account together, from those interested in reading Love's account alone, rather than considering simply all who may be interested to learn what happened in Iran during the relevant period and why it happened. In view of the substantial reproduction of Love's paper in Kwitny's book, I conclude that "some impairment of the market seems likely." *Id.* Accordingly, this factor, too, favors Love.

[10] The factors listed in the statute are not meant to be exclusive, and the statute itself "provides no real instruction as to how the conclusion is to be drawn upon consideration of these factors," *New Era*, 695 F.Supp. at 1500, although the Supreme Court has found that the last factor is the most important. *Harper & Row*, 471 U.S. at 566-67, 105 S.Ct. at 2233-34. However, when the enumerated factors weigh as heavily as they do here in favor of plaintiff, how a more delicate balance might have to be struck is of academic concern only. The substantial quotation of Love's paper in *Endless Enemies* was not fair use.

* * *

For the above reasons, which shall constitute my findings of fact and conclusions of law for purposes of Fed.R.Civ.P. 52(a), defendant is found liable to plaintiff for copyright infringement.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KENNETT LOVE,

Plaintiff,

-against-

84 Civ. 9289 (RO)

JONATHAN KWITNY, CONGDON & WEED, INC., ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY, COLISEUM BOOKS, INC., DOUBLEDAY DORAN BOOK SHOPS, INC. and JOHN KELLY,

ORDER

Defendants.

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A motion having been regularly made by defendants Jonathan Kwitny, Congdon & Weed, Inc., St. Martin's Press, Inc., Book-of-the-Month Club, Inc., Barnes & Nobel [sic] Bookstores, Inc., Coliseum Books, Inc., and Doubleday Book Shops, Inc. for summary judgment in their favor dismissing the Fourth and Fifth Causes of Action of the Complaint,

And, a separate motion having been made by defendant B. Dalton Company to dismiss the Fourth and Fifth Causes of the Complaint for failure to state a claim upon which relief can be granted,

Now, upon considering the pleadings, affidavits, exhibits and memoranda of law submitted by the parties, and having heard the argument of counsel, and due deliberation having been had, and the decision of the Court having been made in a written opinion dated January 13, 1987 it is hereby

ORDERED AND ADJUDGED that defendants' motions to dismiss the Fourth and Fifth Causes of Action in the Complaint be and the same hereby are granted.

[Signed] R. Owen
U.S.D.J.

[Dated] 6/11/87

SO ORDERED:

[Marked]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

KENNETT LOVE,

Plaintiff,

-against-

84 Civ. 9289 (R. O.)

JONATHAN KWITNY, CONGDON & WEED, INC., ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY, COLISEUM BOOKS, INC., DOUBLEDAY BOOK SHOPS, INC., and JOHN KELLY,

Defendants.

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Memorandum endorsed May 21, 1987, upon plaintiff's Notice of Motion for Reargument (on the motion for summary judgment) dated January 23, 1987:

> I am not persuaded that any issue of law or material fact has been erroneously assessed. Leave to reargue is therefore denied. So ordered.
>
> R. Owen
> USDJ
> 5/21/87

The memorandum was filed on May 26, 1987.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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KENNETT LOVE,

Plaintiff,

-against-

JONATHAN KWITNY, CONGDON & WEED, INC., ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY, COLISEUM BOOKS, INC., DOUBLEDAY BOOK SHOPS, INC. and JOHN KELLY,

Defendants.

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OPINION
84 Civ. 9289 (RO)

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In this action for libel and copyright infringement, plaintiff Kennett Love has sued the author, publishers and distributors of a book called *Endless Enemies: The Making of an Unfriendly World*, as well as one of the author's individual sources. Plaintiff, a foreign correspondent for the *New York Times* in Iran in 1953, covered the coup in which Mohammed Reza Shah Pahlevi took power, ousting the government of Premier Mossadegh. The primary defendant, Jonathan Kwitny, is the author of *Endless Enemies* and a journalist for the *Wall Street Journal*. In Chapter 10 of the book, Kwitny describes the 1953 coup, including the role played by the Central Intelligence Agency, and draws certain conclusions therefrom. In so doing, Kwitny quotes extensively from and relies on a subsequent account written by Love in 1960 for a graduate course at Princeton University and based on Love's firsthand observation of the coup. Plaintiff claims that this chapter libels him because it implies that he worked for the CIA and did not report everything he knew in 1953 to the *New York Times*.

Other defendants are Congdon & Weed, Inc., the publisher of *Endless Enemies*; St. Martin's Press, Inc., which distributed all C&W books, including *Endless Enemies*; Book-of-the-Month Club, which published a book club edition of *Endless Enemies*; and several bookstores that allegedly sold copies of the book, namely, Barnes & Noble Bookstores, Inc., B. Dalton Co., Doubleday Bookshops, Inc., and Coliseum Books, Inc.

The final defendant, John Kelly, is the publisher of a Washington, D.C., magazine called *CounterSpy*. He provided Kwitny with a copy of Love's 1960 account of the Iranian coup. Because the plaintiff's complaint asserts only a copyright infringement cause of action against Kelly, Kelly has no part in this motion for summary judgment.

The moving defendants seek summary judgment solely on the libel claims. Because plaintiff has failed to meet his evidentiary burden with respect to the degree of fault as to any of these defendants, summary judgment is granted. Defendants' assertions that the statements in suit are not substantially false, that

they are statements of opinion protected by the First Amendment, and that they are not defamatory as a matter of common law are therefore not reached. B. Dalton Co.'s separate motion to dismiss under Fed. R. Civ. P. 12(b)(6) is not treated separately.

I

To grant summary judgment, Fed. R. Civ. P. Rule 56 requires a court to find that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" and "to assess whether there are any factual issues to be tried, while resolving ambiguities and drawing reasonable inferences against the moving party." *Knight v. U.S. Fire Insurance Co.*, No. 86-7294, slip op. at 185 (2d Cir. Oct. 22, 1986), *citing Anderson v. Liberty Lobby*, 106 S.Ct. 2505, 2509-11 (1986). Here, despite the plaintiff's extensive opposition, there is no disputed issue of material fact.

The essential facts, agreed to by the parties, are as follows. While Kennett Love was in Iran in the summer of 1953 as a correspondent for the *New York Times*, he wrote a series of articles covering the overthrow of Iranian Premier Mossadegh by Mohammed Reza Shah Pahlevi. In 1960, Love wrote an unpublished account and analysis of the coup for a class at Princeton University, a copy of which he later gave Allen Dulles, the former Director of the CIA. While the 1960 paper describes Love's observations of the participation of American officials in events that culminated in the successful coup, none of the articles that Love filed for the *New York Times* mentioned this participation, even without attribution.

In the 1960 paper, Love described such occurrences as his visit on August 17, 1953, to an American embassy official's home. He and another reporter were brought there by someone whom he later discovered was a CIA operative attached to the embassy. At that home, while the reporters met with the son of General Zahedi, who was to replace Mossadegh, other Americans were photoduplicating the royal decree, or "firman," by which the

Shah had appointed Zahedi. This was one of two decrees issued by the Shah at this time. Following this meeting, Love, recounted, "[e]ach of us took a handful [of copies of the firman] back to town. I distributed mine at the Park Hotel . . . ." Love, "The American Role in the Pahlevi Restoration" ("1960 Paper") at 32; *quoted in Endless Enemies* at 172.

In the next few days, Love spoke with various American officials, including the Ambassador, who, Love later wrote, "seemed not in the least surprised" at Love's accounts of various disturbances in Teheran. 1960 Paper at 36; *quoted in Endless Enemies* at 174. On August 19, after the radio station had fallen to the insurgents, Love went there to broadcast a dispatch. At the entrance, he encountered "[a] half-dozen tanks swarming with cheering soldiers." 1960 Paper at 39; *quoted in Endless Enemies* at 176. The rest of this encounter is best told in Love's own words:

> I told the tank commanders that a lot of people were getting killed trying to storm Dr. Mossadegh's house and that they, the tank commanders, ought to go down there where they would be of some use instead of sitting idle at the radio station. They declared my suggestion to be a splendid idea. They took their machines in a body to Kokh Avenue and put the three tanks at Dr. Mossadegh's house out of action after a lively duel with armor-piercing 75-millimeter shells.
>
> . . .

1960 Paper at 39; *quoted in Enless Enemies* at 176.

Plaintiff's objections to Kwitny's account of Love's alleged involvement in the Iranian coup focus on minutiae. For example plaintiff takes issue with such statements as the following:

(1) "The Shah was restored to the throne, not to complete power." Plaintiff's Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment ("Plaintiff's Memorandum") at 3.

(2) Love witnessed the duplication of only one of the firmans, not of two. *Id.* at 4.

(3) Love asserts that he did not "direct" tanks to Mossadegh's house. *Id.* He does not, however, dispute that he made such a "suggestion."

None of the plaintiff's disputes with the defendants' description of the facts, however, raises any issue of material fact in the context of this libel action. I therefore deem the material facts of this case undisputed.

II

A motion for summary judgment in a libel case "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson*, 106 S.Ct. at 2512. The standard of proof to be applied in this case depends on whether Love is considered a public figure or a private individual for the purposes of this lawsuit. I need not, however, decide this issue as a matter of law since the defendants have assumed in their brief, without so conceding for all purposes, that for "the purposes of this motion, . . . [Love] is" a private individual. Defendants' Memorandum at 25. Even adopting this assumption and its reduced burden of proof,* however, I conclude that plaintiff has failed to establish the degree of fault necessary to defeat defendants' motion for summary judgment.

The standard to be met by a private plaintiff in a defamation action is an issue of state law, subject to the constitutional limitation established by the Supreme Court in *Gertz v. Robert Welch, Inc.*, 318 U.S. 323 (1974). States are constrained by *Gertz* to require some degree of fault on the part of the defendant;

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* New York law imposes a considerably less onerous burden on a private plaintiff than the Supreme Court has imposed on public officials, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), or on public figures. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

in other words, a state may not impose strict liability for defamation. In New York, when a private individual alleges that a statement that is "arguably within the sphere of legitimate public concern" is defamatory, "he must establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y. 2d 196, 379 N.Y.S.2d 61, 64 (1975). *See also Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 477 N.Y.S.2d 82, 465 N.E.2d 802 (1984). Thus only if the allegedly defamatory material is within the "sphere of legitimate public concern" does the *Chapadeau* standard apply to determine whether the plaintiff has raised a triable issue as to the defendants' "gross irresponsibility."

A. *Sphere of public concern*

It hardly seems open to question that Chapter 10 of *Endless Enemies*, dealing with events of relatively recent history in Iran, involves matters of legitimate public concern. First, "[t]he passage of time is not always sufficient to remove an event from the sphere of public concern." *Geiger v. Dell Publishing Co.*, 719 F.2d 515, 517 (1st Cir. 1983). More important, however, is the fact that the subject of that chapter, namely, the covert involvement of the American government in the affairs — indeed the overthrow — of a foreign government, is highly pertinent background to hostage issues that have beset two United States administrations.

The plaintiff asserts, however, that such statements as "have to do merely with Love's competence as a journalist" are not subject to the *Chapadeau* standard. However, in determining whether allegedly defamatory material is within the sphere of public concern, one must look at the *primary* subject of that material. In *Gaeta*, *supra*, the New York Court of Appeals faced this issue and held that focusing on the experiences of a single individual to tell the concededly public interest story of the state's

treatment of mental patients did not withdraw the details as to the individual from the applicability of *Chapadeau*.

In this case, the primary subject of Chapter 10 of *Endless Enemies* is clearly the 1953 coup in Iran and its causes, not Kennett Love's acts as a journalist. All the material at issue in this suit is therefore subject to the *Chapadeau* standard.

B. *Gross irresponsibility*

Since the statements alleged by Love to be defamatory are within the area defined by *Chapadeau* as requiring a higher standard, one must ascertain whether Love has raised a triable issue concerning the defendants' gross irresponsibility.

Kwitny relied extensively on Love's own accounts of the historical events and of his involvement in them. Indeed, approximately ten and a half pages of Chapter 10 of *Endless Enemies*, the chapter in which Kwitny discusses the 1953 coup in Iran, consist of almost uninterrupted quotation from Love's 1960 paper. Although Love never disseminated this paper publicly, he did submit it to a professor at Princeton University, and he did send an unsolicited copy to Allen Dulles, former director of the CIA. Love has thus endorsed this version of those events.

If, as *Gaeta* teaches, reliance on a source who personally knew the subject of an article and who had previously furnished accurate information is not grossly irresponsible, then Kwitny's reliance on Love's *own* account can hardly be considered less responsible. Furthermore, Kwitny corroborated the information with a *New York Times* article published in 1980 for which Love was interviewed. "Ex-Times Reporter Accused of Role in '53 Coup in Iran," *New York Times*, Sept. 26, 1980. That article too mentioned Love's distribution of the copies of the firman and his encounter with the tanks in front of the radio station. Moreover, the *New York Times* article quoted Love as saying that "his failure to report on American involvement in the coup . . . was a result of 'misguided patriotism.' " *Id.*

The plaintiff asserts that Kwitny's having "purloined" a copy of the 1960 paper, and his assumption that Love knew in 1953 all the facts which he included in his account in 1960, constitute evidence of gross irresponsibility. I do not agree. First, regardless of Kwitny's method of obtaining the 1960 paper, his reliance on it appears to have been justified by the circumstances. With respect to the second assertion, I note only that the material most at issue here appears to be part of the factual account of Love's activities, of which he must have been aware once he had engaged in them.

Finally, the affidavits that the plaintiff has provided stating that Kwitny's methods demonstrate gross irresponsibility are opinion, and are not conclusive. *Ithaca College v. Yale Daily News Publishing Co., Inc.*, 9105 Misc.2d 793, 433 N.Y.S.2d 530 (Sup. Ct. Tomkins Co. 1980), *aff'd on other grounds*, 85 A.D.2d 817, 445 N.Y.S.2d 621 (3d Dept. 1981). *See also Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 435 N.Y.S.2d 556, 416 N.E.2d 557 (1980), *reargument denied*, 52 N.Y.2d 899, 437 N.Y.S.2d 1030, 418 N.E.2d 1337 (1981); *DeLuca v. New York News Inc.* 109 Misc.2d 341, 438 N.Y.S.2d 199 (N.Y. Sup. Ct. 1981).

III

In a summary judgment motion in a libel case, the plaintiff bears the same burden of proof with respect to the publisher and distributors of a book as to its author. *Geiger v. Dell Publishing Co.*, 719 F.2d 515 (1st Cir. 1983) (applying New York law); *Karaduman v. Newsday, Inc.*, *supra*; *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 397 N.Y.S.2d 943, 366 N.E.2d 1299 (N.Y.), *cert. denied*, 434 U.S. 969 (1977).

A republisher like Book-of-the-Month Club "is entitled to place its reliance upon the research of the original publisher, absent a showing that the republisher had, or should have had, substantial reasons to question the accuracy of the [work] or the *bona fides* of the [author]." *Geiger*, 719 F.2d at 518. *See also Karaduman*, *supra*. Nor may the original publisher and the

distributors of the book be held liable for defamation without fault. *See Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 139 (2d Cir. 1984). Indeed, even if Love had demonstrated gross irresponsibility on Kwitny's part, he would not necessarily have satisfied his burden with respect to the other defendants. *See Karaduman*, 435 N.Y.S.2d at 561.

I conclude that Love has failed to meet his burden with respect to all of the moving defendants, namely, Jonathan Kwitny; Congdon & Weed, Inc.; St. Martin's Press, Inc.; Book-of-the-Month Club; Barnes & Noble Bookstores, Inc.; B. Dalton Co.; Doubleday Book Shops, Inc.; and Coliseum Books, Inc., and summary judgment is granted accordingly.

Submit order on notice.

[Signed] R. Owen

United States District Judge

Dated: New York, New York
January 13, 1987

Federal Rules of Civil Procedure

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. . . . The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

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No. 92-39

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETT LOVE,

Petitioner,

vs.

JONATHAN KWITNY, ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Where the petitioner concedes that his libel claims are governed by a state law standard of care, and the lower courts applied that state law standard in dismissing petitioner's libel claims, should this Court grant certiorari to review whether the lower courts committed error in their application of state law?

2. Where the District Court, in the exercise of its discretion, has made clear and specific factual findings that commercial sales of an infringing book have ceased and that the copyright holder will suffer, at most, a trifling injury from circulation of the few copies of the book that remain in private hands, should this Court grant certiorari to review whether the District Court abused its discretion in denying injunctive relief?

3. Where the District Court, in the sound exercise of its discretion, makes a fact-based determination that a party has violated Rule 11 by filing an utterly meritless Rule 11 motion, and that factual determination is affirmed by the Court of Appeals, should this Court grant certiorari to review the District Court's findings of fact?

STATEMENT UNDER RULE 29.1

Pursuant to Rule 29.1 of the Supreme Court Rules, respondents state that the parent company of respondent St. Martin's Press, Inc. is St. Martin's Enterprises, Inc. which, in turn, is owned by Macmillan Publishers Limited. Macmillan Publishers Limited is owned by Macmillan Limited. St. Martin's Press, Inc. has no subsidiaries (except wholly owned subsidiaries).

The parent company of respondent Book-of-the-Month Club, Inc. is The Time Inc. Book Company which, in turn, is owned by Time Warner Inc. Book-of-the-Month Club, Inc. has no subsidiaries (except wholly owned subsidiaries).

Respondent Barnes & Noble Bookstores, Inc. has no parent company and no subsidiaries (except wholly owned subsidiaries).

The name of respondent B. Dalton Company has been changed to B. Dalton Bookseller, Inc. The parent company of B. Dalton Bookseller, Inc. is Barnes & Noble, Inc. B. Dalton Bookseller, Inc. has no subsidiaries (except wholly owned subsidiaries).

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PRELIMINARY STATEMENT

Respondents, Jonathan Kwitny, St. Martin's Press, Inc., Book-of-the-Month Club, Inc., Barnes & Noble Bookstores Inc., and B. Dalton Company, respectfully request that this Court deny the petition of Kennett Love for a writ of certiorari.

SUMMARY OF ARGUMENT

This libel and copyright infringement action arises from the 1984 publication of a book entitled *Endless Enemies*, which contained some 10 pages of quotes from an unpublished 1960 account in which the petitioner Kennett Love vividly described his first hand observations of American participation and his own participation in events surrounding the 1953 overthrow of Iranian prime minister Mohammed Mossadegh. At the time of the 1953 coup, Love — who was a *New York Times* correspondent stationed in Teheran, Iran — failed to report on his admitted knowledge of American complicity in the coup. Based on the admissions in Love's 1960 account, *Endless Enemies* discloses that Love took "part" in the 1953 coup and provided his *New York Times* readers with "an *in*accurate account that ignored what he knew about U.S. responsibility" for the coup.

The courts below granted summary judgment dismissing Love's libel claims on the ground that Love had failed to raise a triable issue of fact that the respondents had acted with "gross irresponsibility", the governing standard of care under New York law. The lower courts plainly did not err in their application of New York law to the facts of this case, since respondents relied on the admissions in Love's *own* written account that he had taken part in the Mossadegh coup and had known at the time of American involvement in that coup.

Additionally, although finding that use of Love's account in *Endless Enemies* constituted copyright infringement, the District Court did not abuse its discretion in declining to grant a permanent injunction. As found by the District Court, all commercial sales of *Endless Enemies* ceased in 1986, and Love has wholly failed to demonstrate any irreparable injury from the private circulation of the few copies of the book that remain.

Finally, the District Court did not abuse its discretion in denying Love's Rule 11 motion or in imposing Rule 11 sanctions on Love for making the motion. The District Court's determination was based on well-supported factual findings that should not be reviewed by this Court.

COUNTERSTATEMENT OF THE CASE

A. *Love's Reporting on the Coup*

As a *New York Times* correspondent stationed in Teheran in the summer of 1953, Love wrote numerous articles on the now famous coup in which the Shah of Iran overthrew Premier Mohammed Mossadegh. (JA 268)[1] In none of those *Times* articles did Love ever report that the United States Government was involved in the coup. (JA 434)

Thereafter, in a July 1954 letter to his editor at the *Times* (Emanuel Freedman), Love acknowledged that:

> the only instance since I joined the Times in which I have allowed policy to influence a strict news approach was in failing to report the role our agents played in the overthrow of Mossadegh.

(JA 444-45) Similarly, in a second letter to Freedman, dated September 1, 1954, Love again stated that "the only story I had avoided because of policy reasons was the role U.S. agencies, including the embassy, had in the overthrow of Mossadegh and the establishment of the Sahedi [sic] regime." (JA 446)

B. *The Account*

In 1960, while attending Princeton University's School of Oriental Studies (JA 276-77), Love wrote and submitted a 41 page term paper entitled *The American Role in the Pahlevi Restoration: On 19 August 1953* (the "Account"). As succinctly stated by District Court Judge Richard Owen in his opinion below, "the 1960 [Account] describes Love's observations of the

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[1] "JA" refers to the Joint Appendix filed by the parties in the United States Court of Appeals for the Second Circuit.

participation of American officials in events that culminated in the successful coup." (A 56)[2]

Thus, on the very first page of the Account, Love wrote:

> *According to my observations at the time*, operatives of the Central Intelligence Agency concerted plans for action with Maj. Gen. Fazlollah Zahedi, retired, who was to lead the coup and assume the premiership.

(JA 153) (emphasis added)

In the Account, Love set forth several first-hand "observations" of the "American Role" in the overthrow of Mossadegh, including the following:

> *My first observation of the association of the United States with the royalist cause began with a telephone call to me at the Park Hotel from Joe Goodwin, a C.I.A. man attached to the embassy as a political officer.* Mr. Goodwin called shortly after the 7 A.M. news broadcast and asked if I wanted to meet General Zahedi to get the real version of what had happened. It was arranged for me to be taken at 11 A.M. to a rendezvous to meet General Zahedi, who was being hunted by the police. . . . *We were driven to the residence of an American embassy official in Shimran.* There we met Ardeshir Zahedi, who told us that his father had decided on second thought that it was unsafe to be at any given place at any given time. . . . Ardeshir was waiting in the living room with the occupant of the house when I arrived. . .
>
> Ardeshir told us about the Shah's issuance of the two firmans [decrees]. He showed us the one appointing

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[2] References to the decisions of the courts below, which are reproduced in the appendix to Love's petition, are cited herein as "A".

> his father premier. *Then he handed it to the occupant of the house who took it into the adjoining dining room where there stood a large photoduplicating machine . . . As Ardeshir talked two operators made sheafs of copies of the firman. Each of us took a handful back to town. I distributed mine at the Park hotel, except for one copy, which I still have.*

(JA 183-184) (emphasis added)[3]

In addition to his "distrib[ution]" of the Shah's royal decree appointing Zahedi as the new premier, Love also frankly acknowledged in the Account that he himself contributed to the Shah's "final victory" as follows:

> Incidentally, I, myself, was responsible, in an impromptu sort of way, for speeding the final victory of the royalists. After the radio station fell I went up there to obtain permission to broadcast a dispatch . . . . A half-dozen tanks swarming with cheering soldiers were parked in front of the radio station. I told the tank commanders that a lot of people were getting killed trying to storm Dr. Mossadegh's house and that they, the tank commanders, ought to go down there where they would be of some use instead of sitting idle at the radio station. They declared my suggestion to be a splendid idea. They took their machines in a body to Kokh Avenue and put the three tanks at Dr. Mossadegh's house out of action after a lively duel with armor-piercing 75 millimeter shells.

(JA 191)

C. *The Prior News Reports Concerning Love*

In 1966, Love interviewed Allen Dulles (who had been the Director of the C.I.A. at the time of the Mossadegh coup) and,

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[3] Love testified at the copyright infringement trial below that he distributed copies of the Shah's decree at the request of the Embassy officer, Goodwin. (Trial Transcript ("Tr.") 104)

pursuant to Dulles' request, sent Dulles a copy of the Account. (JA 278) Sometime after Dulles' death in 1969, the Account was transferred to the manuscript library at Princeton University. (JA 278, 811)

Thereafter, in 1977, Love was interviewed in connection with an article which appeared in the *New York Times* on December 27, 1977. The 1977 *Times* article, entitled "C.I.A. Established Many Links to Journalists in U.S. and Abroad", reported (among other things) that:

> An "asset" . . . can be anyone the C.I.A. finds useful as a source of information or in any other way.
>
> • • •
>
> One such individual, a C.I.A. official said, was Kennett Love, a former New York Times correspondent in the Middle East who, though never paid, had what the official described as "a cooperative relationship" with the C.I.A. in which he "ran errands."
>
> Reached at his home in California, Mr. Love said that shortly after the overthrow of Premier Mohammed Mossadegh of Iran in 1953, he helped the C.I.A. distribute copies of a declaration naming Ardeshir Zahedi as Mr. Mossadegh's successor. But Mr. Love said he had not known at the time that Joseph C. Goodwin, the American official who had asked him for help, had been a C.I.A. man and that he had never knowingly done anything else for the C.I.A.

(JA 204)

Similarly, in a 1980 interview with Cable Network News, Love again confirmed that he distributed the Shah's royal decree, acknowledged that he sent royalist tanks to Mossadegh's house and acknowledged that in August 1953 he was aware of American involvement in the coup:

> Q: The most significant thing you did in an unwitting fashion, then, was to distribute these firmans [*i.e.*, decrees].

Love: Right. To carry it from that American's house, who, curiously enough — it should have told me something that he had this huge, expensive photoduplicating machine there. *But I figured, you know, the Embassy's involved in this thing, and it is our policy, and so forth.* I just didn't know that we had an arm of covert operations known as the C.I.A. at that time. . . .

Q: Of course, you did send the tanks to Mossadegh's house also.

Love: I did, I did.

(Exhibit Volume ("E.") 78) (emphasis added)

Portions of Love's Account were subsequently quoted in a magazine entitled *Counterspy* (JA 194-99), and the *Counterspy* story was then reported in the *New York Times* on September 26, 1980. The 1980 *Times* article stated that, when reached for comment, Love again "[a]knowledg[ed] that he had suggested to tank commanders that they attack forces near Mr. Mossadegh's home and had distributed copies of decree by the Shah . . . hours before the coup. . . ." (JA 205) The *Times* article further reported that "[Love] said his failure to report on American involvement in the coup, once he learned about it later in 1953, was a result of 'misguided patriotism.' " (*Id.*)

Love's failure to report on American involvement in the 1953 coup was also pointed out in an article which appeared in the November 8, 1982 issue of *Newsweek* magazine:

> Keeping secrets requires the acquiescence, if not connivance, of the press. In 1953 a New York Times reporter named Kennett Love decided not to write about the CIA's role in deposing leftist Iranian Prime Minister Mohammed Mossadegh - out of "misguided patriotism", Love later said. The story came out anyway.

(JA 206)

D. *Quotation of the Account in Endless Enemies*

Sometime in 1981, respondent Kwitny received a copy of the Account from the publisher of *Counterspy*. (Tr. 169) At that time,

Kwitny — an experienced and highly regarded journalist and author[4] — was writing a book on American foreign policy entitled *Endless Enemies*. When Kwitny began to write a chapter on the Mossadegh coup, he decided to quote from the Account because it was "[t]he best record of how this repression of Iranian independence started." (JA 729)

Accordingly, Kwitny telephoned Love on February 21, 1983 and, as found by Judge Michael Mukasey below, obtained Love's oral consent to quote some of the Account. (A 41) Kwitny subsequently confirmed Love's consent in writing. (JA 353) Portions of the Account were thereafter quoted in *Endless Enemies*, with credit for those quotations attributed to Love. (JA 731-744)

Endless Enemies was published in June 1984 by Congdon & Weed,[5] and was distributed by respondent St. Martin's Press, Inc. ("St. Martin's"). (JA 147) In 1985, *Endless Enemies* was a runner up for a Pulitzer Prize in the General Nonfiction category. (JA 61, 1271) Additionally, respondent Book-of-the-Month Club, Inc. ("BOMC"), as a licensee of Congdon & Weed, republished a hard cover and a soft cover edition of the Book. (JA 149-50) Finally, respondents B. Dalton Company ("B. Dalton") and Barnes & Noble Bookstores, Inc. ("B&N") are two bookstore chains that sold copies of *Endless Enemies*.

All sales of *Endless Enemies* by these corporate respondents and other bookstores ceased in 1986. The few copies of the Book that remain in print are all in respondent Kwitny's private possession.

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[4] Kwitny was an investigative reporter and foreign correspondent for the *Wall Street Journal*, has authored six books and was the host and managing editor of a weekly television show on foreign and domestic affairs called *The Kwitny Report*. (Tr. 162-63, 165-66) Kwitny has received nine Pulitzer Prize nominations for his *Wall Street Journal* reporting, has twice won the New Jersey Press Association's award for Distinguished Public Service and is the recipient of the Honor Medal for Career Achievement from the University of Missouri School of Journalism. (Tr. 163-64)

[5] This action has been stayed against Congdon & Weed by reason of its bankruptcy.

E. *The Statements in Suit*

In quoting from the Account, *Endless Enemies* discloses that Love participated in events connected with the Mossadegh coup and points out that he failed in his 1953 *Times* articles to report his knowledge of American complicity in the coup. Thus, Kwitny states in *Endless Enemies* that, in his 1953 *Times* articles, "Love was giving his own U.S. readers an *in*accurate account that ignored what he knew about U.S. responsibility." (JA 740) (emphasis in original) Kwitny also states that Love took "an active, covert part in a CIA coup." (*Id.* at 737) As Love indicates in his petition for certiorari, it is these statements that form the gist of his libel claims. (*See* Petition for A Writ of Certiorari ("Cert. Pet.") at 5)

In concluding that Love had failed to apprise his *Times* readers of U.S. involvement, Kwitny reviewed all of Love's August 1953 *Times* articles and compared them to the Account. (JA 65, 70-76) This comparison revealed that, unlike Love's vivid first-hand observations in the Account, his 1953 *Times* articles made no mention of American participation in the coup. (JA 67)

Similarly, Kwitny's conclusion that Love had taken "part" in the coup was based primarily on Love's *own* written description of his actions — including his distribution of a royal decree integral to the coup, his admitted responsibility for advising pro-Shah tanks to proceed to Mossadegh's house (in what became the final battle of the coup), and his detailed knowledge of actions undertaken by the American Embassy during the coup. (JA 67) Moreover, Kwitny's conclusion about Love's participation in the coup was further based on his review of the interviews given by Love in the 1977 and 1980 *Times* articles. (JA 65, 67) Finally, Kwitny believed that Love's failure to report American involvement in the coup was, in itself, an important form of participation. (JA 67)

F. *The Libel Opinion*

In December 1984, Love instituted the within libel and copyright infringement action.[6] After discovery was complete,

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[6] In the past eight years, Love has filed a literal barrage of unsuccessful defamation actions against Kwitny. In addition to the within suit, Love also filed a

(Footnote continued)

respondents moved for summary judgment dismissing Love's libel claims on the grounds, among others, that the statements in suit are substantially true, and were not published with the degree of fault required by New York law. (JA 57-59). Thereafter, by opinion dated January 13, 1987 (A 54-62) (the "Libel Opinion"), Judge Richard Owen granted respondents' motion.

In dismissing Love's libel claims, Judge Owen ruled that because Kwitny's alleged defamatory statements involved "matters of legitimate public concern" — American involvement in the Mossadegh coup — Love was required under the decisional law of New York to "establish, by a preponderance of the evidence, that the [defendants] acted in a grossly irresponsible manner. . . ." (A 59) (quoting *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 64, 341 N.E.2d 569 (1975)) Applying this state law standard of care, Judge Owen held that, as a matter of law, a reasonable jury could not find that Kwitny had acted with gross irresponsibility[7] because:

> Kwitny relied extensively on Love's own accounts of the historical events and of his involvement in them. . . .

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second libel suit against Kwitny in the Supreme Court of the State of New York, Suffolk County, entitled *Love v. Kwitny, et al.*, Suffolk County Index No. 19677/87 (hereafter referred to as "*Love v. Kwitny II*"), and a third suit in the U.S. District Court for the Eastern District of New York (hereafter referred to as "*Love v. Kwitny III*"). All three defamation actions against Kwitny derive in one way or another from *Endless Enemies*, and all three actions have been dismissed by way of pre-trial motions. *Love v. Kwitny II* is now on appeal.

In addition, Love has also filed at least three state court defamation actions against other authors and publishers who have written books about his behavior during the 1953 coup. Those actions are *Love v. William Morrow & Co., Inc.* (Sup. Ct. Suffolk Co., Index No. 414/88) (hereafter referred to as "*Love v. William Morrow*"), and two related proceedings entitled *Love v. St. Martin's Press, Inc.* (Sup. Ct. N.Y. Co., Index No. 19839/86) and *Love v. Parenti* (Sup. Ct. N.Y. Co., Index No. 23123/86) (collectively referred to as "*Love v. St. Martin's*"). *Love v. William Morrow* was summarily dismissed on grounds of substantial truth and no proof of gross irresponsibility, and is now on appeal. *Love v. St. Martin's* is still in the discovery phase.

[7] In his opinion, Judge Owen found it unnecessary to rule on the other grounds raised by respondents in support of their summary judgment motion, including substantial truth.

> If, as *Gaeta* [*v. New York News, Inc.*, 62 N.Y.2d 340, 477 N.Y.S.2d 82, 465 N.E.2d 802 (1984)] teaches, reliance on a source who personally knew the subject of an article and who had previously furnished accurate information is not grossly irresponsible, then Kwitny's reliance on Love's *own* account can hardly be considered less responsible.

(A 60) (emphasis in original)[8]

In so holding, Judge Owen expressly rejected Love's repeated charge that it was grossly irresponsible for Kwitny to assume that Love knew in 1953 what he wrote in his 1960 Account. As has every other judge who has considered the issue, Judge Owen noted that "the material most at issue here appears to be part of the factual account of Love's activities, *of which he must have been aware once he had engaged in them*." (A 61) (emphasis added)

G. *The Copyright Infringement Opinion and the Damage Opinion*

Love's remaining causes of action for copyright infringement were eventually tried before Judge Michael B. Mukasey in May 1988.

By opinion and order dated February 21, 1989 (A 25-51) (the "Copyright Infringement Opinion"), Judge Mukasey found that, contrary to Love's trial testimony, he had indeed had a telephone conversation in which he granted Kwitny permission to quote "some" of the Account in *Endless Enemies*. (A 35)[9] The lower court nonetheless ruled that the amount of material quoted by Kwitny exceeded the scope of Love's consent (A 44) and, accordingly, constituted copyright infringement.

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[8] Additionally, Judge Owen ruled that the other respondents were entitled to rely on Kwitny's reputation as a responsible journalist in satisfying their standard of care under *Chapadeau*. (A 61-62)

[9] In rejecting Love's denial of the telephone conversation, Judge Mukasey expressly found that Love either "lied outright at trial" or "engaged in self-delusion" and that "[n]either inference is particularly to Love's credit[.]" (A 42)

The issue of copyright damages was thereafter addressed by way of a Stipulation of Undisputed Facts and briefs from the parties. By opinion and order dated August 26, 1991 (the "Damage Opinion"), Judge Mukasey ruled that Love was entitled to recover 2.6% of the profits realized by each respondent from sales of *Endless Enemies*. (A 10)

In the Damage Opinion, Judge Mukasey also held that Love was not entitled to either a permanent injunction or to destruction of the approximately 980 copies of *Endless Enemies* that remain in Kwitny's private possession. Noting that this Court has repeatedly held that an injunction " 'is not a remedy which issues as of course' . . . or 'to restrain an act the injurious consequences of which are merely trifling,' " Judge Mukasey reasoned that:

> [S]ales of "Endless Enemies" appear to have run their course.
>
> * * *
>
> Love has not explained what an injunction could accomplish at this stage of the litigation beyond a gratuitous slap at Kwitny. . . . "Endless Enemies" does not appear now to be a hot item, and the book is available in libraries for those still curious to read it. Love himself seems to have acknowledged the obvious by waiving any claim for his own lost profits: if there ever were any such profits, they are gone and cannot be proved. In that circumstance, it is both impossible to conceive of a future market for Love's paper that would be protected by an injunction and impermissible to hallucinate one. When the injurious consequences to Love's copyright from continued circulation of Kwitny's book are, if anything, " 'trifling,' " . . . no injunction is warranted. . . .

(A 17, 19) (quoting, in part, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982))

Finally, in his Damage Opinion, Judge Mukasey denied Love's Rule 11 motion and found that Love had violated Rule 11 by "filing a motion in which no reasonable attorney could have found objective merit." (A 23)

H. *The Second Circuit Decision*

On appeal by Love, the Court of Appeals for the Second Circuit unanimously affirmed the lower court opinions. (A 2-3) Love thereafter filed a Petition for Rehearing In Banc, which was denied by the Court of Appeals on May 18, 1992. (A 1)

REASONS FOR DENYING CERTIORARI

POINT I

THE LOWER COURTS DID NOT ERR IN THEIR APPLICATION OF STATE LAW TO LOVE'S LIBEL CLAIMS

In his petition for certiorari, Love does not dispute that his libel claims are governed by the "gross irresponsibility" standard of New York law. (Cert. Pet. at 6)[10] Instead, Love seeks Supreme Court review solely on the narrow issue of whether the lower courts erred in their *application* of this state law standard of care to the facts of this case. As set forth below, this Court has consistently stated that, absent a showing of plain error, it will not ordinarily review the determination of state law issues by the lower federal courts, and Love has wholly failed to present any meritious claim of error that would cause this Court to depart from that rule.

As his own petition indicates, Love's *sole* claim of error is that the lower courts "set aside state precedents" in granting summary judgment to Kwitny on the issue of gross irresponsibility.

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[10] As this Court made clear in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), so long as state law does not impose strict liability, the states are free to "define for themselves the appropriate standard of liability for a publisher . . . of [alleged] defamatory falsehoods injurious to a private person." 418 U.S. at 347. In response to *Gertz*, New York's highest court, in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975), ruled that where alleged defamatory statements (such as the ones in suit) are "arguably within the sphere of legitimate public concern," a private figure plaintiff like Love must "establish, by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau*, 38 N.Y.2d at 199, 379 N.Y.S.2d at 64.

(Cert. Pet. at 13, 10)[11] This contention is simply specious. Far from ignoring state law, the result reached below faithfully adheres to well-settled New York precedent governing the meaning and application of the gross irresponsibility standard.

Under New York law, "gross irresponsibility" requires "evidence that the [author] grossly distorted" the information he has gathered, "sprang to unwarranted conclusions" or "had, or should have had . . . reason to doubt the accuracy" of his sources. *Simonsen v. Malone Evening Telegram*, 98 A.D.2d 905, 470 N.Y.S.2d 898, 900 (3d Dep't 1983). *See also, DeLuca v. New York News Inc.*, 109 Misc.2d 341, 438 N.Y.S.2d 199, 205 (Sup. Ct. N.Y. Co. 1981) (under New York's gross irresponsibility standard, writers "have the right to be wrong so long as they are not guilty of not checking their facts at all, making gross distortions of the record or jumping to totally unwarranted conclusions"). Moreover, the New York Court of Appeals has ruled that summary judgment is particularly appropriate in cases involving the gross irresponsibility standard of care since "the standard may be satisfied by wholly objective proof." *Gaeta v. New York News, Inc.*, 62 N.Y.2d 340, 351, 477 N.Y.S.2d 82, 86, 465 N.E.2d 802 (1984). Accordingly, libel cases involving the *Chapadeu* standard are often dismissed on motions for summary judgment. *See, e.g., Post v. Regan*, 677 F. Supp. 203 (S.D.N.Y.), *aff'd*, 854 F.2d 1315 (2d Cir. 1988), *cert. denied*, 488 U.S. 1043 (1989); *Ithaca College v. Yale Daily News Publishing Co.*, 105 Misc.2d 793, 433 N.Y.S.2d 530 (Sup. Ct. Tompkins Co. 1980), *aff'd*, 85 A.D.2d 817, 445 N.Y.S.2d 621 (3d Dep't 1981).

Here, the lower courts plainly did not misapply New York law in granting summary judgment to Kwitny on the issue of gross

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[11] Love apparently concedes the propriety of summary judgment in favor of the non-author respondents (*i.e.*, St. Martin's, BOMC, B. Dalton and B & N), since he does not even refer to them, much less argue their liability. As was held by the District Court and affirmed by the Second Circuit in dismissing the libel claims against these respondents, New York law permits such republishers and distributors to rely "upon the research of the original publisher, absent a showing that the[y] . . . had, or should have had, substantial reasons to question the accuracy of the [work] or the bona fides of the [author]." (A 61) (*quoting Geiger v. Dell Publishing Co.*, 719 F.2d 515, 518 (1st Cir. 1983) (applying New York law)) Here, Love has made no such showing and, hence, there can be no ground for reviewing the judgment below as to these respondents.

irresponsibility. Far from using unreliable sources or springing to "unwarranted conclusions," Kwitny relied on Love's *own* Account as the basis for his statements that Love took "part" in the Mossadegh coup and that Love failed to report "what he learned about U.S. responsibility" for the coup.

Indeed, Love concedes in his petition that the Account accurately depicts "his acts and omissions in Teheran in 1953." (Cert. Pet. at 10) However, in a vain attempt to somehow raise a triable issue of fact, Love absurdly contends that "[n]othing in the [Account] recites any direct observation by Love of American involvement in the coup." (Cert. Pet. at 11)

As found by several courts, this assertion is literally incredible. For at the very outset of his Account, Love expressly states that he knew *at the time* — from August 16 to August 19, 1953 — that the United States helped engineer the coup:

> *According to my observations at the time*, operatives of the Central Intelligence Agency concerted plans for action with Maj. Gen. Fazlollah Zahedi, retired, who was to lead the coup and assume the premiership.

(JA 153) (emphasis added) This statement by Love — standing alone — certainly entitled Kwitny to conclude that Love knew of American involvement in 1953 and gave an "*in*accurate account" to his *Times* readers, since Love's *Times* dispatches indisputably contained nothing about U.S. involvement in the coup.

Additionally, Love's Account relates specific incidents evidencing Love's knowledge of American assistance to the coup. For example, the Account states that Love was taken by an American embassy official (Joe Goodwin) to the home of another American embassy official to meet General Zahedi. (JA 183-84) There Love met General Zahedi's son, who gave the U.S. official the Shah's decree naming General Zahedi as the new premier. This was, after all, the very heart of the coup — ousting Mossadegh and installing Zahedi. The American embassy official in Love's presence then had "sheafs of copies" of the decree made on a large photoduplicating machine and those copies were then widely distributed. As Love candidly acknowledged in his Account, this activity by American officials constituted "[m]y first *observation*

of the association of the United States with the royalist cause . . ." (JA 183) (emphasis added)

Based on Love's admitted "observations", it can hardly be argued that Kwitny acted in a grossly irresponsible manner in stating that Love knew about U.S. participation in the coup and gave an inaccurate account to his readers in that regard.[12]

Just as Love tries to deny his documented knowledge of American assistance to the coup and his total failure to inform his *Times* readers of that assistance, he disingenuously states that he did not take "any part in the coup, covert or otherwise." (Cert. Pet. at 6) Again, Love's newly-minted rendition of events is flatly contradicted by his own written Account.

As Love admits in the Account, he "distributed" copies of the Shah's decree that appointed Zahedi as the new premier and helped set the coup in motion. (JA 184) Because Dr. Mossadegh's government controlled all communications in Teheran, Love's distribution of the Shah's decree to foreign reporters at his hotel enabled news of the coup to be spread. Since dissemination of the decree was critical to the success of the coup and since Love indisputably participated in that dissemination, his admitted actions obviously constituted "participation" in the coup.

Love also assisted in the coup in another important way, as he somewhat proudly admitted: "I, myself, was responsible, in an impromptu sort of way, for speeding the final victory of the royalists." (JA 191) Love helped "speed" the "final victory" by suggesting to pro-Shah tank commanders that they take their six

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[12] Indeed, the very same reasonable conclusion was reached by the author of the 1982 *Newsweek* article, who wrote that "[i]n 1953 . . . Kennett Love decided not to write about the CIA's role in deposing leftist Iranian Prime Minister Mohammed Mossadegh . . . ." (JA 206) Similarly, in his copyright infringement opinion, Judge Mukasey ruled that it is "self serving and dubious [for Love to] suggest[ ] that he was unaware of American involvement in the coup at a time when, according to his unpublished paper, he was witnessing that involvement." (A 21)

tanks to Mossadegh's residence to end the resistance of Mossadegh's forces. (JA 191)[13]

Love's role in the coup was, moreover, confirmed by the two *New York Times* articles on which Kwitny relied. (JA 65, 67) The 1977 *Times* article described Love as a CIA "asset" who ran "errands", which included "help[ing] the C.I.A. distribute copies" of the Shah's decree. (JA 204) Similarly, the September 26, 1980 *Times* article reported that, during an interview, Love acknowledged that he had "distributed copies of the decree" and "suggested to tank commanders that they attack forces near Mr. Mossadegh's home." (JA 205)

The District Court's finding that Kwitny did not act with gross irresponsibility is further supported by similar holdings in the various state court actions brought by Love. Thus, in *Love v. Kwitny II*, Love instituted a defamation action against Kwitny and others based on Kwitny's statement during a television interview that "Love . . . took part in [the Mossadegh] coup along with the C.I.A. and State Department people that he knew were running that coup. . . ." (JA 1039). In granting the defendants' motion for summary judgment, New York State Supreme Court Justice John McCarthy (like Judge Owen) found that Kwitny had not acted with gross irresponsibility in making the statement in suit because:

> The sources relied upon by defendant in his telecast were utterances by plaintiff in his [Account] . . .
>
> One cannot say that it was not a fair inference from [the Account] . . ., that plaintiff had "taken part in that coup along with the C.I.A. and State Department people that he knew were running that coup." He did pick up and distribute pro-Shah firmans, and counseled the tank

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[13] Love makes the totally specious claim that the coup was over when he told the tank commanders at the radio station that they "ought to go down" to Dr. Mossadegh's house. He thus argues that he could not have assisted in the overthrow of Mossadegh's government. This absurd argument is flatly contradicted by Love's own written statement that he "was responsible for speeding the *final* victory of the royalists." (JA 191) (emphasis added)

> commander; he did attend at an embassy official's home where the firmans were photocopied for distribution.

(JA 1042)[14]

In sum, every state and federal judge who has reviewed Love's Account has found that, as a matter of law, it is not grossly irresponsible to conclude from that Account that Love participated in the Mossadegh coup.[15]

Love also quibbles over several inconsequential statements in *Endless Enemies*. Thus, while conceding that his account was sent to Allen Dulles, Love objects to Kwitny's statement that Dulles received it "while director of all U.S. intelligence gathering," when in fact he was then retired. (Cert. Pet. at 11) This is at most a minor error since Dulles obviously continued to have vast influence within the CIA and the U.S. intelligence community. More important, Love does not and cannot contend that Kwitny's description of his submission of the Account to Dulles constitutes the gist of his libel claims. *See Printers II, Inc. v. Professionals Publishing, Inc.*, 784 F.2d 141, 146 (2d Cir. 1986) (applying New York law); *Doyle v. Vintners International Co.*, 775 F.Supp.79, 83 (W.D.N.Y. 1991) (under New York law, "[i]t is not necessary that every detail in an account be accurate").

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[14] Likewise, in *Love v. William Morrow*, Love alleged that he was defamed by a statement about the "tank incident" contained in a book on American foreign policy entitled *Presidents' Secret Wars*. As did the District Court below, the New York Supreme Court in *William Morrow* granted summary judgment dismissing the action on the ground that Love had failed to raise a triable issue of fact as to the author's gross irresponsibility, declaring that:

> the Court cannot conclude that it was grossly irresponsible for the author or publisher of *Presidents' Secret Wars* to report in a single sentence the particular, admitted, role played by the plaintiff, Kennett Love, in the ascension of the Shah of Iran to power in 1953.

(JA 643)

[15] In his Petition for Certiorari, Love also attempts to create a triable issue of fact on gross irresponsibility by literally misquoting the language in suit. Thus, Love claims that Kwitny wrote: "And there we have it, folks - the Iranian correspondent for the *New York Times* . . . overthrowing the government. . . ." (Cert. Pet. at 3) In fact, what Kwitny *actually* wrote was: "And there we have it, folks - the Iranian correspondent for the *New York Times directing the successful tank attack on the home of the Iranian prime minister*, overthrowing the government. . . ." (JA 743) (emphasis added)

Seeking to somehow establish gross irresponsibility, Love further claims "that Kwitny *arguably* fabricated the contents of a [telephone] interview with Love." (Cert. Pet. at 12) (emphasis added) This baseless contention is flatly contradicted by the District Court's findings in the Copyright Infringement Opinion. (A 34-35) Indeed, not only did Judge Mukasey expressly find that the telephone interview took place, but he further determined that, in denying the existence of the interview, Love either "lied outright at trial" or engaged in "self delusion". (JA 42) So too, Judge Mukasey also found that Kwitny's notes accurately reflect the contents of his conversation with Love. (A 35, 42) And, even without regard to the notes' adjudicated accuracy, Love does not (and cannot) explain why Kwitny's notes are in any manner relevant to the determination of whether Kwitny acted with gross irresponsibility in relying on the admissions in Love's own Account.

Finally, Love contends that his petition should be granted under this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), arguing that he has "present[ed] evidence from which a jury might return a verdict in his favor." (Cert. Pet. at 14) But Love has offered no evidence from which a reasonable jury could find that Kwitny "grossly distorted" the information he had gathered, "sprang to unwarranted conclusions" or "had, or should have had . . . reason to doubt the accuracy" of his sources. *See Simonsen v. Malone Evening Telegram*, *supra*; *DeLuca v. New York News, Inc.*, *supra*.[16]

In sum, there is simply no issue of fact that, in relying on Love's *own* Account and on *Times* reports, Kwitny was warranted in stating that Love knew of American involvement in the coup, failed to report that involvement and participated in the coup. Accordingly, the District Court properly granted and the Second Circuit properly affirmed summary judgment dismissing the libel claims. This Court should not review those determinations. After

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[16] Love's claim that a fact issue is created by the conclusory affidavits of supposed experts — who were not shown to be in possession of the facts — is spurious and entitled to no weight, as the District Court held. (A 61) A party opposing summary judgment "must set forth specific facts showing that there is a *genuine* issue for trial" (*Anderson v. Liberty Lobby*, 477 U.S. at 256) (emphasis added), and Love's "expert" affidavits plainly fail to raise any genuine issue of fact.

all, seven judges — three Court of Appeals judges, two District Court judges and two state court judges — have considered and unanimously found that the statements in suit (or closely similar ones) were not grossly irresponsible under New York law.

In fact, this Court has repeatedly indicated that, in the absence of a showing of plain error, it will not ordinarily review a claim that the Court of Appeals has misapplied state law. *See, e.g., Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944) ("ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate appellate courts"); *Palmer v. Hoffman*, 318 U.S. 109, 118 (1953). Underlying this reluctance is the Court's determination that "[t]he federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues." *Butner v. United States*, 440 U.S. 48, 58 (1979).

Here, Love does not and cannot show that the lower courts erred in their application of New York law. Accordingly, there is no basis at all for granting the Petition for Certiorari to review the dismissal of the libel claims.

POINT II

THE REFUSAL OF THE DISTRICT COURT TO ISSUE AN INJUNCTION IS CONSISTENT WITH SETTLED LAW AND WAS A SOUND EXERCISE OF DISCRETION

Love argues that the District Court's denial of a permanent injunction is in conflict with the decisions of this Court, of the Second Circuit and of other Circuits. This argument is utterly without basis. Every court that has considered the question has recognized that the grant of an injunction for infringement, whether of a published or unpublished work, rests in the sound discretion of the trial court.

Indeed, the "discretionary nature of injunction as a remedy for copyright infringement is apparent in the pertinent statutory provision." *New Era Publications Int'l, ApS. v. Henry Holt, Co.*, 884 F.2d 659, 661 (2d Cir. 1989) (Miner, J., concurring). Thus, Section 502(a) of the Copyright Act expressly provides that the

trial court "*may* . . . grant temporary and final injunctions on such terms as it may deem reasonable. . . ." 17 U.S.C. § 502(a) (emphasis added). Moreover, given its "discretionary nature", the grant or denial of a permanent injunction for copyright infringement will not be disturbed on appeal except upon a showing that the trial court abused its discretion. *See D.C. Comics, Inc. v. Mini Gift Shop*, 912 F.2d 29, 36 (2d Cir. 1990); *Shapiro, Bernstein & Co. v. 4636 S. Vermont Ave., Inc.*, 367 F.2d 236, 242 (9th Cir. 1966).

On appeal to the Second Circuit, Love conceded that the "granting of equitable relief [in an infringement action] lies within the sound discretion of the trial court." (Appellant's Brief at 29) Similarly, in his present petition, Love once again recognizes that the grant of equitable relief is discretionary. (Cert. Pet. at 16) Love nonetheless contradicts his own concession by frivolously contending that "all of the precedents — including those of the Second Circuit — are to the effect that unpublished copyrighted expression is entitled to absolute protection." (Cert. Pet. at 16)

Love's contention is contrary to the Second Circuit's recent decision in *New Era Publications, Int'l, ApS. v. Henry Holt, Co.*, 884 F.2d 659 (2d Cir. 1989) ("*New Era* II"), *denying rehearing en banc of, New Era Publications Int'l, ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir.) ("*New Era* I"), *cert. denied*, 493 U.S. 1094 (1990). All eight judges in *New Era* II — those in the majority as well as those in dissent — agreed that, even where (as here) a defendant has infringed upon an unpublished paper, an "injunction is not the automatic consequence of infringement and that equitable considerations always are germane to the determination of whether an injunction is appropriate." *New Era* II, 884 F.2d at 661 (Miner, J., concurring). *See also New Era* II, 884 F.2d at 664 (Newman, J., dissenting) ("[t]he panel's holding demonstrates that its language is not to be understood as narrowing [with respect to unpublished works] the equitable discretion as to the propriety of an injunction which is conferred by [the Copyright Act]").

Likewise, there is no support for Love's claim that other Circuits and this Court have held that once infringement is found,

an injunction must automatically issue. Indeed, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), which is cited by Love, concerned the question of copyright liability, and had nothing whatsoever to do with the issue of injunctive relief. *See New Era* II, 884 F.2d at 663 (Newman, J., dissenting).[17]

In short, as Love conceded below and qualifiedly concedes in his petition, the District Court plainly had discretionary authority to deny a permanent injunction. Moreover, the Second Circuit unanimously affirmed the District Court's exercise of that discretion. Certainly, this Court should not grant certiorari to review the lower court's discretion, especially since the District Court is in a unique position to weigh the relevant factors involved and plainly did so with care.

Love nevertheless argues that the District Court failed to exercise its discretion in accordance with applicable precedents. (Cert. Pet. at 16) Contrary to Love's frivolous assertion, the District Court – in denying injunctive relief – carefully followed the governing principles laid down by the Second Circuit and by this Court.

In *New Era* II, the Second Circuit ruled that, as in all other copyright cases, an injunction will not issue in connection with the infringement of an unpublished work unless the plaintiff satisfies the traditional prerequisites to the grant of injunctive relief. *New Era* II, 884 F.2d at 661 (Miner, J., concurring). This Court has articulated those traditional requirements as follows:

> [An injunction] "is not a remedy which issues as of course," . . . *or "to restrain an act the injurious consequences of which are merely trifling."* . . . An injunction should issue only where the intervention of a

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[17] Love's reliance on *Walt Disney Co. v. Powell*, 897 F.2d 565 (D.C. Cir. 1990), is likewise misleading. Love states that the following language from *Nimmer on Copyright* is quoted with approval in *Powell*:

> it would appear to be an abuse of discretion to deny a permanent injunction where liability has been established and there is a continuing threat of infringement.

(Cert. Pet. at 17) In fact, Love's quote is inaccurate in that it omits the key qualifying word "*generally*," which appears in both the *Powell* decision (897 F.2d at 567-8) and in *Nimmer on Copyright*, 14.06 [B] at 14-90 (1992).

> court of equity "is essential in order effectually to protect property rights against injuries otherwise irremediable."

Weinberger v. Romero-Barcelo, 456 U.S. 305, 311-12 (1982) (citations omitted) (emphasis added). *See also Tennessee Valley Authority v. Hill*, 437 U.S. 153, 193 (1978).

In the present proceeding, the lower court clearly did not abuse its discretion in determining that only "trifling" harm would befall Love by denial of injunctive relief. St. Martin's, BOMC, B. Dalton and B&N completed their sales of *Endless Enemies* almost five years ago, have no intent to resume sales of *Endless Enemies* and have absolutely no copies of the Book in their possession. Indeed, of the approximately 25,000 copies of *Endless Enemies* that were published by Congdon & Weed and BOMC, only 980 copies remain, and those copies are all in Kwitny's private possession. (Stipulation of Undisputed Facts, ¶¶ 39, 40) Given that sales of *Endless Enemies* ran their course by 1986, it is difficult to conceive of any real market for the few copies that remain. More important, as Judge Mukasey pointed out below (A 19), because more than 20,000 copies have been already circulated to the reading public and because the Book is widely available in libraries around the country, any claimed residual injury to plaintiff through Kwitny's private distribution of the few remaining copies would, at best, be "trifling."

Additionally, Love's prior conduct belies his present claim of irreparable injury. Although Love instituted this proceeding more than seven years ago, at no time did he ever seek a temporary restraining order or a preliminary injunction. So too, at no time has Love ever presented any evidence that he has incurred loss of profits or other monetary damage by reason of the infringement. At the 1988 copyright infringement trial, Love conceded that, in the 28 years since the Account was written, he had made no efforts whatsoever to publish the Account in any form. (Tr. 90) Moreover, Love has acknowledged in the Stipulation of Undisputed Facts that he "does not seek to recover . . . 'actual damages.' " (Stipulation ¶ 1)

Given Love's admitted inability to establish present or future economic injury, together with the limited number of books left

in Kwitny's hands, the District Court clearly did not abuse its discretionary authority in determining that it is "impossible to conceive a future market for Love's paper that would be protected by an injunction and impermissible to hallucinate one." (A 14) *See also Universal City Studios, Inc. v. Sony Corp. of America*, 480 F.Supp. 429, 451 (C.D. Cal. 1979) ("prognostication of irreparable injury is particularly difficult for a court to make when no harm has occurred to date and predictions of future harm are based on ... speculation"), *rev'd on other grounds*, 659 F.2d 963 (9th Cir. 1981), *rev'd on other grounds*, 464 U.S. 417 (1984).

Love erroneously contends that "there appears to be no authority whatever entitling a court to speculate on the existence or nonexistence of a future market for an unpublished work." (Cert. Pet at 15-16)[18] In fact, in his concurring opinion in *New Era* I, Chief Judge Oakes expressly stated that the interests protected by the Copyright Act are "not served by an injunction where there is no demonstrable impairment of the quoted materials' future market value." *New Era* I, 873 F.2d at 596. *See also Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95

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[18] Love also asserts that Judge Mukasey's finding of "no market impairment" is somehow inconsistent with his fair use analysis in the Copyright Infringement Opinion. (Cert. Pet. at 15) In so asserting, Love confuses the showing necessary to establish a copyright *infringement* with the showing necessary to obtain an *injunction* by reason of that infringement.

To establish an unfair use of his Account by Kwitny, Love was required to show, not actual irreparable harm, but only the possibility that Kwitny's use might effect a "*potential* market for ... the copyrighted work." 17 U.S.C. §107(4) (emphasis added). *See also Salinger v. Random House, Inc.*, 811 F.2d 90, 99 (2d Cir.) ("the proper inquiry concerns the 'potential market' for the copyrighted work"), *cert. denied*, 484 U.S. 890 (1987). Applying this less onerous burden of proof, Judge Mukasey held that an infringement finding was appropriate because, even though Love had never published the Account, he "has the right to change his mind. He is entitled to protect his *opportunity* to sell his paper." (A. 485) (quoting *Salinger*, 811 F.2d at 99) (emphasis in original)

In sharp contrast to the "potential market" inquiry under the fair use analysis, injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time in the future." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931). Instead, to justify the grant of an injunction, "the injury must be both certain and great; it must be actual and not theoretical." *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

(2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). Since here there would admittedly be no "demonstrable impairment" of any market for Love's unpublished work arising from future circulation of the few copies of the Book which remain, Love obviously cannot establish the necessary showing of irreparable harm.

Despite his failure to establish prospective economic injury, Love nonetheless contends that he has an absolute entitlement to an injunction because there supposedly exists a threat of continuing infringement by Kwitny. (Cert. Pet. at 17) This contention is flatly contradicted by the lower court's factual finding that sales of *Endless Enemies* have "run their course" and that the Book is no longer a "hot item." (A 17, 19) Contrary to Love's suggestion, Kwitny's mere distribution of 15 copies of the Book to WNYC as part of a 1988 station fundraising drive — which occurred well *before* any finding of infringement — is hardly the type of serious continuing infringement that would justify the "harsh and drastic" remedy of an injunction. *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F.Supp. at 464.

Since Love has wholly failed to demonstrate irreparable injury and has, at most, shown "trifling" injury, this Court need go no further in denying review of the lower court's discretionary refusal to grant injunctive relief. And, even if Love had shown irreparable injury, "[t]he public interest is always a relevant consideration for a court deciding whether to issue an injunction." *New Era* II, 884 F.2d at 664 (Newman, J., dissenting). *See also Mercoid Corp. v. Mid-Continent Investment Co.* 320 U.S. 661, 670 (1944); *Standard & Poor's Corp. v. Commodity Exchange, Inc.*, 683 F.2d 704, 711 (2d Cir. 1982).

Here, the infringing material accounts for less than 2.6% of an important book on foreign policy that is almost entirely the product of defendant Kwitny's talent, efforts and creativity. (Stipulation, ¶¶ 5, 7) Cognizant of the public injury that would result from enjoining infringing works (such as Kwitny's) that contain a large amount of non-infringing information of public interest, some courts have refused to grant injunctions and have awarded limited royalties instead — which is the relief afforded Love below. *See, e.g., Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988) ("[t]he success of the movie [Rear Window]

resulted in large part from factors completely unrelated to the underlying [infringed] story . . . [A]n injunction could cause public injury by denying the public the opportunity to view a classic film for many years to come"), *aff'd*, 495 U.S. 207 (1990); *Universal City Studios, Inc. v. Sony Corp. of America*, 659 F.2d 963, 976 (9th Cir. 1981) ("Nimmer suggests that when great public injury would result from an injunction, a court could award damages or a continuing royalty. This may very well be an acceptable resolution in this context"), *rev'd on other grounds*, 464 U.S. 417 (1984).

The public interest plainly mandates that *Endless Enemies* – a book of outstanding merit that deals with issues of vital national and international importance, and that contains only a miniscule amount of infringing material – not be enjoined. More important, even absent these compelling public interest considerations, the District Court clearly did not abuse its discretion – as the Second Circuit held – in denying injunctive relief given that Love has not established the requisite showing of irreparable harm.

POINT III

THE DISTRICT COURT PLAINLY DID NOT ABUSE ITS DISCRETION IN MAKING A FACT-BASED DETERMINATION THAT LOVE VIOLATED RULE 11 BY FILING A MERITLESS RULE 11 MOTION

In prosecuting his barrage of lawsuits, Love and his attorney below have repeatedly gone beyond zealous advocacy and have levelled virulent personal attacks against various defendants, their attorneys and the judges who have ruled against Love. For example, Love's counsel viciously charged in an affirmation submitted in *Love v. William Morrow* that, in his Libel Opinion, Judge Owen "invent[ed] facts prejudicial to plaintiff, [and] doctor[ed] the record." (JA 804) *See also* JA 823 ("Judge Owen['s] . . . expertise is not in the fields of historiography or journalism but in that of constructing opera libretti")

Consistent with this ongoing practice, in his Rule 11 motion Love challenged virtually every paper submitted by defendants in the libel and copyright proceedings, and accused defendants' counsel of "act[s] of dishonesty," "pernicious knowing misrepresentations," "outright falsehood[s]," "deception," "incessant

prevarications," "fraud," and a "pervasive pattern of dishonest submissions." (JA 545) In denying Love's motion and in imposing Rule 11 sanctions on Love for making the motion, Judge Mukasey expressly found that "[p]laintiff's motion for Rule 11 sanctions is as meritless as it is tendentious – which is to say, utterly. . . ." (JA 1458) The District Court's rejection of Love's numerous irresponsible accusations was plainly proper and does not warrant review by this Court for several interrelated reasons.

First, as this Court recently stated in *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990), "[a] District Court's ruling that a litigant's position is factually well-grounded and legally tenable for Rule 11 purposes is . . . *fact specific*." (emphasis added) And, indeed, Love's Supreme Court petition is merely an unvarnished request for an evidentiary review of several "fact specific" contentions that were raised and rejected by Judge Mukasey. (*See* Cert. Pet. at 20-23) Time and time again, this Court has reiterated that "[w]e do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). *See also NLRB v. Hendrick's County Rural Electrical Corp.*, 454 U.S. 170, 176 n.8 (1981).

Moreover, the District Court's well-supported findings of fact have been unanimously affirmed by the Second Circuit. This Court "has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts." *Rodgers v. Lodge*, 458 U.S. 613, 623 (1982). *See also Berenyi v. Immigration and Naturalization Service*, 385 U.S. 630, 636 (1967); *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949) ("a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error").

In addition to this Court's repeated refusal to review factual determinations, the standard of review applicable to Rule 11 motions likewise compels the denial of Love's petition. In *Cooter & Gell*, *supra*, the Court expressly held that "an appellate court should apply an abuse of discretion standard in reviewing all aspects of a District Court's Rule 11 determination." *Cooter &*

Gell, 496 U.S. at 405. Application of this "deferential standard" (*id.* at 378), plainly demonstrates that the District Court did not abuse its discretion (nor commit "obvious and exceptional . . . error") in finding Love's Rule 11 motion to be "utterly" meritless.[19]

In his petition, Love raises the same frivolous allegations that have been twice rejected below. Thus, Love contends it was a "misrepresentation" for defense counsel to state in a Post-Trial Memorandum of Law that "Love testified that [his East Hampton post office] box number . . . was not publicly available." (Cert. Pet. at 20, 22) In fact, when asked at the copyright infringement trial, Love indeed stated that he would not in 1983 have given out his box number as his mailing address. (JA 1288) Furthermore, "after considering all the evidence and weighing the credibility of the witnesses," Judge Mukasey expressly ruled in his Copyright Infringement Opinion that "Love's East Hampton post office box number [is] an item of information *not* available in any public listing." (A 30, 34) (emphasis added) In sum, Love's invocation of Rule 11 with respect to his P.O. box number is belied both by his own trial testimony and by the factual findings of the lower court, and is "utterly" frivolous.

Similarly, in his Rule 11 motion (as well as in his present petition), Love also attacked an error in defendants' original Statement of Uncontested Facts (the "Statement"). Yet, in seeking sanctions, Love disingenuously failed to apprise the District Court that four years prior to Love's Rule 11 motion defendants had amended the Statement to correct that *very* error. (*See* JA 429) As found by Judge Mukasey, Love's failure to inform the court of defendants'

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[19] Relying on lower court precedent that *pre-dates* this Court's *Cooter & Gell* decision, Love erroneously states in his petition that "[f]indings of fact [on a Rule 11 motion] are reviewed under a 'clearly erroneous' standard, while the question whether a given set of facts constitutes a violation of the rule is examined *de novo*." (Cert. Pet. at 19) In *Cooter & Gell*, the Court explicitly rejected this multi-tiered approach and, instead, adopted an abuse of discretion standard for "*all* aspects of a District Court's Rule 11 determination." 496 U.S. at 405 (emphasis added). Given that Love specifically cites *Cooter & Gell* in his petition (Cert. Pet. at 21), his error in attempting to claim a *de novo* standard of review is especially glaring.

amendment to the Statement "captures the spirit and betrays the emptiness of plaintiff's [Rule 11] submission." (A 20)[20]

As found by the District Court, when stripped of all its inflammatory invective, Love's motion below was an obvious attempt to misuse the Rule 11 machinery in order to once again reargue factual contentions that were expressly rejected by Judge Owen in his Libel Opinion. (A 23-24) Thus, as he does in his Petition for Certiorari, Love contended below that it was a Rule 11 violation for defendants to allege that "[i]n the Account, Love states that he personally suggested to Iranian tank commanders loyal to the Shah that they attack Mossadegh's house. . . ." (JA 256)

Contrary to Love's attempt at historical revision, the words of the Account itself state: "I told the tank commanders . . . they . . . ought to go down there [Mossadegh's house] where they could be of some use." (JA 191) Moreover, the Account indicates that the tank commanders then "took their machines in a body to Kohk Avenue and put the three tanks at Dr. Mossadegh's house out of action after a lively duel. . . ." (*Id.*) In the midst of an attempt to violently overthrow a sitting government, why else would someone tell insurgent forces to redeploy to the Premier's house — "where they could be of some use" — if not to "attack"? Indeed, Love boasts in the Account that he was "responsible, in an impromptu sort of way, for speeding the final victory of the royalists." (*Id.*)

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[20] So too, with an unrestrained recklessness that typified his entire Rule 11 motion below, Love contends in his petition that an inadvertent proof reader's error in quoting certain trial testimony in a post-trial brief was tantamount to "tamper[ing] with the actual testimony of [an] expert[ ]" witness. (Cert. Pet. at 23) The more pedestrian explanation and the truth, however, is that (as defense counsel confirmed in a sworn affidavit submitted to the District Court) the misquoted word was just that: an innocent, inadvertent, unintentional misquotation which did *not* alter in any meaningful way the content of the quoted passage. (JA 545-46, 608-609) It is simply irresponsible and inexcusable for Love and his counsel to persist in equating such an honest error with "tampering" with testimony. Indeed, after the copyright trial, Love himself submitted an errata page identifying typographical and proofreader's errors in his *own* post-trial brief. (JA 1353)

Since "no reasonable lawyer could have found objective merit" in Love's Rule 11 motion (A 23), the District Court plainly did not abuse its discretion or commit "obvious" error in denying the motion nor in imposing sanctions on Love for making the motion. *See Nakash v. United States Dept. of Justice*, 708 F.Supp. 1354, 1468 (S.D.N.Y. 1988) ("[r]equests for sanctions . . . are . . . subject to the same Rule 11 analysis as all other motions"). Accordingly, Love's petition for certiorari should be denied.

CONCLUSION

For the reasons stated above, respondents respectfully request that the instant petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit be denied.

Dated: New York, New York
August 3, 1992

Respectfully submitted,

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(3)

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No. 92-39

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KENNETT LOVE,

Petitioner,

vs.

JONATHAN KWITNY, ST. MARTIN'S PRESS, INC., BOOK-OF-THE-MONTH CLUB, INC., BARNES & NOBLE BOOKSTORES, INC., B. DALTON COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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PREFATORY REMARK

Within the tight confines of this Reply Brief we cannot undertake to deal with every detail of Respondents' Brief, let alone recapitulate the matter in the Petition. Thus we assume full familiarity with the latter, in particular with the meaning of the terms "*firman* incident" and "tank incident" (at 5), and the "participation" and "false reporting" accusations (at 6).

I — CONCERNING SUMMARY JUDGMENT

The *firman* and tank incidents took place three days before and several hours after the coup, respectively. To turn Love's description of these incidents into an endless series of "admissions" of participation and false reporting, respondents stretch the duration of the coup, making it begin on August 15 and run through August 19. This will not wash. All commentators, including Love's affiants, agree that the coup was over at noon on August 19, and for acknowledgment that that was the *only* day of the coup we can cite pp. 163 and 186 of ENDLESS ENEMIES itself. Respondents also find themselves compelled to rely heavily on propositions — *e.g.*, that "dissemination of the decree was critical to the success of the coup", Brief at 15 — that have no basis in fact or the record.

Contrary to respondents' insinuations, Love's affiants, leading experts in journalism and historiography, were fully aware of the facts. They were acquainted with both Love's term paper and Kwitny's glossed version of it, and thus eminently positioned to declare ENDLESS ENEMIES violative of "the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau*, Petition at 5-6. (Two of the affiants were CIA "insiders" in the coup.) These affiants stated that Love's acts and omissions were completely within the parameters of normal journalistic practice, and that he was justified in viewing the actions of the Embassy as being within the parameters of normal diplomatic practice. (It is not a coup for a head of state to dismiss a head of government.) From the fact that Love knew the Embassy to have an "association" with the royalists, and that it was its "policy" to support them, he could not have inferred that it was actively involved in the coup.

Whether summary judgment was properly granted with respect to the libel counts in this action, on the ground that Love had failed to meet his evidentiary burden with respect to the appropriate standard of fault, is a question concerning the relation between the materials Kwitny had at his disposal at the

time of his writing and what he made of them. Respondents, unable to refute Love's contention that some of Kwitny's acts and omissions exhibited Constitutional malice, and others gross irresponsibility, now attempt to muddy the waters by bringing in materials not available to Kwitny when he wrote. We can deal here only with Love's 1954 letters.

Love has never denied that he got wind of the U. S. Government's involvement in the coup "later in 1953". He heard about it from Robert Doty, his bureau chief, who replaced Love in Teheran a few days after the coup and subsequently encountered a talkative CIA operative. In 1954, this second-hand hearsay was all that Love had to go on. Doty opposed calling it to the attention of the *Times* and ordered Love not to do so. To make an end-run around Doty, Love wrote to the *Times* about "the refusal of both Doty and myself to report the U.S. role in the overthrow of Mossadegh", but this was at a time when, by *Times* standards, Love himself still had nothing of the kind to report.

Love's 1954 letters to the *Times* were released by Love himself, during the pendency of the instant litigation, to Professors William A. Dorman and Mansour Farhang, who were then working on their magisterial study THE U.S. PRESS AND IRAN (University of California Press 1987). After extensive inquiry, they wrote about Love, "[W]e have concluded he did not learn of CIA involvement until some five months after the coup. . . . If anyone from the *Times* knew in August 1953, it most likely was Doty." At 54. (All this is, of course, known to respondents.)

Respondents write, "Love's counsel viciously charged . . . that, in his Libel Opinion, Judge Owen 'invent[ed] facts prejudicial to plaintiff, [and] doctor[ed] the record.' " Brief at 25. But Judge Owen found that Love sent "an unsolicited copy" of his term paper to Allen Dulles. Petition at A-60. This "fact" — surely prejudicial to Love in light of Kwitny's attempts to link him with the CIA — is wholly of Judge Owen's manufacture. Moreover, in his opinion Judge Owen writes:

> [T]he *New York Times* article [of September 26, 1980] quoted Love as saying that "his failure to report on American involvement in the coup . . . was a result of 'misguided patriotism.' "

Ibid. What the elision dots conceal, however, is Love's disclaimer, "once he learned about it later in 1953". Thus Judge Owen turned Love's denial of the "false reporting" allegation into a confession. If this is not doctoring the record, it is difficult to see what would be. Moreover, it is done in the very paragraph in which Judge Owen, invoking *Gaeta*,[1] holds that Kwitny's "reliance" on Love's words cannot be deemed grossly irresponsible. Thus Judge Owen makes it look as if Kwitny had been entitled to rely on a confession, whereas in fact he should have been forewarned by the denial.

This is merely symptomatic of the difficulties that Judge Owen encounters in dismissing the "false reporting" cause of action. Petition at A-61. Consider, for example, his amazing argument, "I note only that the material most at issue here appears to be part of the factual account of *Love's activities, of which he must have been aware once he had engaged in them.*" (Emphasis added.) The question, of course, is not whether Love was aware of his *own* activities, but whether he was aware of those of the U. S. Government personnel engineering the coup! Lastly, Judge Owen dismisses the affidavits of Love's experts, as "opinion, and . . . not conclusive", citing three cases, not one of which says

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[1] *Gaeta* stands for the proposition that, if a source has previously provided reliable information, it is not grossly irresponsible to rely on it, even though in a given instance it might supply incorrect information. In *Gaeta*, however, defendant was sued for having published what the generally reliable source had said, whereas Kwitny was sued (in libel), not for publishing Love's words, but for adding defamatory glosses to them. At his deposition, Kwitny admitted that, *but for these glosses*, his readers might not experience the "shock and incredulity" he professed to have experienced on reading Love's term paper.

anything about opinion affidavits. (In any event, the affidavits of the non-moving party do not have to be "conclusive" — they need merely raise a triable issue of material fact.)

It is therefore clear that the motion for summary judgment was decided in a manner that does not comport with the jurisprudence of F.R.C.P. 56 and of *Anderson v. Liberty Lobby, Inc.*, to the effect that the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." 477 U.S., at 257. And this jurisprudence is the same for unpopular causes of action as for popular ones.

II — CONCERNING INJUNCTIVE RELIEF

That injunctive relief is discretionary is not in dispute. What is in dispute is only whether the district court abused its discretion. We therefore skip over respondents' redundant argument, Brief at 19-22, to the effect that injunctions are discretionary. And we agree that equitable considerations may militate against the issuance of an injunction — as laches did in *New Era*, Petition at 16. None of this changes the fact that "under ordinary circumstances [as here, where there are no equitable considerations to the contrary] the copying of 'more than minimal amounts' of unpublished expressive material calls for an injunction barring the unauthorized use", *ibid.* Relying on Nimmer's "Generally, it would appear to be an abuse of discretion to deny a permanent injunction where [as here] liability has been established and there is a threat of continuing infringement", *Walt Disney Company v. Powell*, 897 F.2d 565 (D.C. Cir. 1990), states the rule unconditionally: "When a copyright plaintiff has established a threat of continuing infringement, he is *entitled* to an injunction." At 567-568.[2]

Love also "satisfies the traditional prerequisites to the grant of injunctive relief", which require that such relief be "essential

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[2] In their footnote 17, Brief at 21, respondents turn Nimmer-*Disney*'s "threat of continuing infringement" (which obtains here, since infringement has been established) into "continuing threat of infringement".

in order effectually to protect property rights against injuries otherwise irremediable." Brief, at 21-22. For *New Era* itself recites:

> The [district] court fully recognized that, while an injunction is a drastic remedy, *Weinberger v. Romero-Barcelo* * * *, courts will readily find the requisite threat of irreparable injury in copyright cases, *see, e.g., Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 94 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 . . . (1978).

873 F.2d, at 595. *Wainwright* plainly states that "irreparable injury . . . can normally be presumed when a copyright is infringed." 558 F.2d, at 94. And contrary to what respondents suggest, Brief at 23, *Universal City Studios, Inc. v. Sony Corp. of America*, 480 F.Supp. 429 (C.D.Cal. 1979), is completely consistent with this holding:

> [C]ourts have acknowledged that . . . "in the ordinary case," irreparable harm is presumed when the copyright holder's "right to the exclusive use of the copyrighted material is invaded." *American Metropolitan Enterprises of New York, Inc. v. Warner Brothers Records, Inc.*, 389 F.2d 903, 905 (2d Cir. 1968).

At 464.

Irreparable injury, moreover, is not necessarily economic injury, as *Harper & Row*, with its emphasis on an author's right to control the circumstances of first publication, Petition at 16, makes clear. Of course *Harper & Row* "had nothing whatsoever to do with the issue of injunctive relief", Brief at 21, since it dealt with the threshold question whether *The Nation*'s taking was fair use, one already settled — adversely to respondents — in the instant case. *Harper & Row* did rule out compulsory licenses in the case of unpublished copyrighted expression, and that is of the essence here, since the Court of Appeals in effect imposed such a license upon plaintiff.

In any event, the potential damage from continued infringement consists not only in the possible distribution of the nearly 1,000 copies of ENDLESS ENEMIES remaining in Kwitny's hands[3] – which in and of itself, on traditional theories, deserves to be enjoined – but in that the infringing book may be republished. Respondents, without any support in the Record, allege that the publisher-distributor defendants "have no intent to resume sales of *Endless Enemies*", Brief at 22. Significantly, they fail to make any such statement about Kwitny. In this connection, an item (obviously inspired by Kwitny's circle) in the column "Inside New York", on page 13 of *New York Newsday* of April 15, 1992, appears particularly ominous:

> **Free at Last**
>
> Former Wall Street Journal writer **Jonathan Kwitny** . . . and his book are finally free of **Kenneth** [sic] **Love**'s lawsuits. . . . [T]he other day the Second Circuit Court of Appeals . . . upheld the copyright claim – Love gets 2.6 percent of Kwitny's profits on the book. But now at least maybe Kwitny can *have* some profits. . . .

Finally, we dispose of the absurd suggestion that "the public interest plainly mandates that *Endless Enemies* . . . not be enjoined", Brief at 25, and respondents' attempt to compare Kwitny's book to the motion picture REAR WINDOW. To be sure, in *Abend v. MCA, Inc.*, 863 F.2d 1465 (9th Cir. 1988), the court refused to enjoin that film, even though it infringed the copyright in a short story (one, incidentally, that had been *published*), because the "film resulted from the collaborative efforts of many talented individuals other than . . . the author of the underlying story . . . [and] defendants could not possibly separate out

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[3] The argument that, because more than 20,000 copies of ENDLESS ENEMIES have already been distributed to the public, there is no point in trying to prevent additional distribution could serve to permit any initially successful infringer to bootstrap himself into being permitted to continue infringing forever. It should not be made in, let alone *by*, a Federal court. Brief at 22.

the 'new matter' from the underlying work," at 1479. With respect to ENDLESS ENEMIES, of course, not only is it easy to separate Kwitny's writing from Love's — there already exists an edition from which the purloined material was deleted. Thus Kwitny, if enjoined from further distributing Love's text, would in no way be impeded from marketing what is rightfully his, and no colorable First Amendment concerns would be raised by the issuance of an injunction.

III — CONCERNING RULE 11

In his Rule 11 motion, Love indeed "challenged virtually every paper submitted by defendants in the libel and copyright proceedings", Brief at 25. But then, virtually every such paper violated Rule 11 one or more times. Some of these violations would be apparent only to persons fully familiar with the factual background of the case and the state of the litigation at the time. That is why the Petition focused on violations that can be substantiated, with certainty, from the face of the Record: examples of misrepresentation for which both the original document or testimony and the defense-concocted version is available for inspection. As a result, no fact-finding is required here, and respondents' extensive argument, Brief at 26-27, that appellate tribunals are ill-equipped, hence reluctant, to undertake such efforts, is beside the point. Whether the five numbered examples offered in the Petition at 20-23 constitute violations of Rule 11 is a question of law and can indeed be decided by an appellate court.

Respondents are unable to refute a single one of these examples. As for the first, all they can say is that "Love disingenuously failed to apprise the District Court that four years prior to Love's Rule 11 motion defendants had amended the Statement to correct that *very* error." Brief at 27. Quite apart from the fact that the retraction was not voluntary, but forced by Love's attorney, it is irrelevant to the question whether Rule 11 was violated: a retraction does not cure a violation, which is "complete when the paper is filed." Petition at 21.

Nor can respondents defuse Example No. 2. Nothing that they quote from Love's term paper speaks of attacking Mossadegh's

house. Contrary to the spirit of *Masson v. New Yorker Magazine*, 111 S.Ct. 2419 (1991),[4] respondents attempt to salvage their claim by advancing what they consider a "rational interpretation" of what Love wrote:

> In the midst of an attempt to violently overthrow a sitting government, why else would someone tell insurgent forces to redeploy to the Premier's house . . . if not to "attack"?

Brief, at 28. Respondents have known since at least 1985 that Love's conversation with the tank commander took place not "[i]n the midst of an attempt to violently overthrow a sitting government", but hours after the government had in fact been overthrown.

Respondents apparently thought it best not to deal with Example No. 3 at all. With regard to Example No. 4, their argument takes the strange form that Judge Mukasey's clearly erroneous finding, which could have been induced only by the defense's misrepresentation, validates that very misrepresentation. Brief, at 27. Such circular self-rehabilitation should not be tolerated.

In the attempt, finally, to downplay the seriousness of the defense's tampering, in a post-trial submission, with trial testimony, respondents push the discussion into a footnote, Brief at 28, n. 20, and ask us to believe that we are faced with "an inadvertent proof reader's error". This requires too great a suspension of disbelief. Proofreaders may *overlook* errors, but they do not generally *introduce* them — certainly not, by sheer happenstance, precisely as necessary to transmute testimony that failed to conform to predictions into testimony appearing to conform. (To say that the change — which turned Love from an *eyewitness* to the coup into an *insider* — "did *not* alter in any meaningful way the content of the quoted passage", Brief at 28, n. 20, is of course, a plain insult to the intelligence of the reader.)

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[4] To be sure, *Masson* dealt with direct quotations, but much of its analysis clearly carries over to indirect quotations as well.

In any event, in the jurisprudence of the revised Rule 11 the "good faith" apology no longer carries.

To those of us who litigate in the Southern District of New York and the Second Circuit Court of Appeals it is a matter of the greatest seriousness that these courts are apparently content to underenforce Rule 11 by tolerating the misrepresentation, and even the outright falsification, of deposition and trial testimony as well as the contents of documents, at least if these acts are committed by a prestigious law firm. The situation reaches the danger point, however, when a litigant, having for six years been the victim of such practices, complains of them to the court, supporting his Rule 11 motion by ample citations showing that similar practices had triggered sanctions in other districts, only to be held to be in violation of Rule himself for having made the motion. This is bound to send the wrong signal to the local bar: misrepresentation of documents and testimony will not be punished, but bringing it to the attention of the court will!

For that reason, Petitioner respectfully suggests that the holdings of the courts below, exonerating the defense of Rule 11 violations and finding plaintiff to have committed one, depart from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit in the captioned matter.

Respectfully submitted,

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